

Social Relations

American Communist
Nat.
Soc.

340.1	H15	H15
		58
		58
Laines		
The revival of		

340.1.H15

**Carnegie Institute of Technology
Library
PITTSBURGH, PA.**

Rules for Lending Books

1. Reserved books may be used only in the library until 8 P. M. After that hour they may be requested for outside use, due the following morning at 9:30. Ask at the desk about week-end borrowing privileges.
2. Books not of strictly reference nature, and not on reserve may be borrowed for longer periods, on request. **Date due** is stamped on date slip in book.
3. A fine of five cents an hour is charged on overdue reserved book. Two cents a day fine is charged on overdue unreserved books.



Date Due

JAN 3 1949

Jan 17 '49


Dec 14 '49

DEC 1 '50

DEC 15 '58

MAY -5 '61





Digitized by the Internet Archive
in 2022 with funding from
Kahle/Austin Foundation

HARVARD STUDIES IN
JURISPRUDENCE

VOLUME IV

LONDON : HUMPHREY MILFORD

OXFORD UNIVERSITY PRESS

THE REVIVAL OF NATURAL LAW CONCEPTS

*A Study of the Establishment and of the Interpretation of Limits
on Legislatures with special reference to the Development of
certain phases of American Constitutional Law*

BY

CHARLES GROVE HAINES

Professor of Political Science, University of California at Los Angeles



HARVARD UNIVERSITY PRESS
CAMBRIDGE, MASSACHUSETTS

1930

COPYRIGHT, 1930
BY THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE

340.1

H15

PRINTED AT THE HARVARD UNIVERSITY PRESS
CAMBRIDGE, MASS., U. S. A.

TO
BERTHA MOSER HAINES



PREFACE

THE investigation of the practice of the review of legislative acts by the courts to test their conformity with the provisions of written constitutions has involved the consideration of theories of natural law and of ideas of superior fundamental laws. These theories and ideas are closely related to doctrines of higher or superior laws which have accompanied the growth of legal systems. Due to the importance of such ideas in public law and in the development of limits on the different branches of modern governments, a study has been made of the main stages in the evolution of higher law concepts. A considerable part of the study is devoted to the significance of natural law ideas in the interpretation of the state and federal constitutions in the United States, where natural law doctrines have been extensively applied. The review of the growth of natural law ideas and the presentation of representative opinions of European publicists are intended to aid in the interpretation of American theories and as a perspective to evaluate some modern tendencies in constitutional development in the United States.

It is evident that the concepts of natural law and of fundamental law are frequently associated. Though natural law may be thought of with little relation to the notion involved in fundamental laws, and fundamental laws may be conceived unrelated to natural law, it is customary at various stages of such analyses for one idea to merge into the other. Carlyle, in speaking of the views of the Roman jurists on natural law, doubted whether any of the lawyers had very clear conceptions upon the matter. As a matter of fact all theories of natural law have a singular vagueness which is

both an advantage and disadvantage in the application of the theories.

Philosophers emphasize the fact that such a term as natural law is a value concept and the result of an attitude — an attitude which presupposes certain psychic processes. Such value concepts are in one sense subjective, and in another sense they have a normative objectivity. It is beyond the scope of this treatise to deal with the philosophical and psychological processes which underlie natural law thinking. The purpose is to present different types of theories in their legal development and to note their applications by jurists and lawyers.

Articles by the writer relating in part to this subject have appeared in the *Yale Law Journal*, *Illinois Law Review*, and the *Texas Law Review*. The portions used from these articles have been rewritten in a continuous account with the exception of extracts from the *Texas Law Review* which are reprinted with some minor changes by permission of the editors. In the presentation of ideas relating to natural law in European countries, I have received invaluable assistance from Professor Georgio del Vecchio, Rector of the University of Rome, and Professor Louis Le Fur of the Faculty of Law of the University of Paris, who have favored me with very useful Italian and French publications relating to natural law. In addition I have been accorded the privilege by authors and publishers to translate and reprint portions of the works of European authorities on natural law. I take pleasure in expressing my appreciation for aid received from Dean Roscoe Pound, who has frequently indicated in books and in articles the influence of natural law concepts in the development of American law.

CHARLES GROVE HAINES

LOS ANGELES, CALIFORNIA
November, 1929

CONTENTS

PART I

A SURVEY OF THE DEVELOPMENT OF NATURAL LAW DOCTRINES

I. ANCIENT AND MEDIAEVAL NATURAL LAW THEORIES . . .	3
1. Graeco-Roman Concepts	4
2. Natural Law in the Middle Ages	12
3. Theories following the Reformation	17
4. Types of Natural Law Ideas in Ancient and Medi- aeval Times	24
II. ENGLISH HIGHER LAW DOCTRINES	28
1. Natural Law Ideas and English Doctrines relating to Fundamental Laws	29
2. Natural Law and the Doctrine of the Supremacy of the Law	32
3. Evidences of Natural Law Ideas in Judicial Decisions	39
4. Types of Natural Law Theories applied in English Law	43
5. Differences between the Anglo-American and the Continental Legal Points of View	44
III. AMERICAN AND FRENCH NATURAL LAW DOCTRINES . . .	49
1. Transition from Natural Law Doctrines to Theories of Natural Rights	49
2. American Theories of Natural Law and of Inalienable Rights	52
3. French Natural Law Concepts	59
4. The Decline of the Natural Rights Philosophy . . .	65

PART II

THE ACCEPTANCE OF NATURAL LAW OR SUPERIOR
LAW CONCEPTS IN THE PUBLIC LAW
OF THE UNITED STATES

IV. JUDICIAL CONSTRUCTION OF IMPLIED LIMITS ON AMERICAN LEGISLATURES	75
1. Denial of the Application of Natural Law Concepts	75
2. Natural Law Theories in the Formative Period of American Law	77
3. Higher Law Theories as a Sanction for the Establishment of the Review of Legislative Acts by Courts	80
4. Limits on Legislatures resulting from the Nature of the Social Compact and from the Nature of Free Republican Governments	86
5. Construction of Limits on Legislatures to protect Vested Rights	88
6. The Main Purpose of the Establishment of Express and Implied Limits on Legislative Powers	95
7. A Reaction from the Federalist Doctrine of Limiting Legislative Activities	97
8. The Return to the Former Natural Law Theories	99
V. NATURAL LAW THEORIES AND DUE PROCESS OF LAW	104
1. Divergent Views on the Meaning of Due Process of Law	104
2. Due Process of Law as applied by the Justices of the State Courts prior to 1870	108
3. Cooley's Efforts to extend the Meaning of Due Process of Law	116
4. Economic and Legal Bases for a Revival of Natural Law Thinking	117
5. Due Process of Law made an Agency for the Maintenance of Reactionary Tendencies	122

PART III

THE FOURTEENTH AMENDMENT AND NATURAL
LAW THEORIES

VI. THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION AND DUE PROCESS OF LAW	143
1. Period of Restricted Interpretation	145
2. Economic and Political Pressure brings about a Change in Supreme Court Decisions	149
3. Reversal of the Former Opinions on the Meaning of Due Process of Law	154
(a) Due Process of Law applied to the Procedure in the Regulation of Public Utilities	154
(b) Due Process of Law and Liberty of Contract	160
VII. THE DEVELOPMENT OF A GENERAL RULE OF REASON TO DETERMINE THE VALIDITY OF LEGISLATIVE ACTS	166
1. Arbitrary Legislative and Administrative Acts are Void	166
2. Acts Contrary to Fundamental Rights are Void	172
3. Police Regulations must be Reasonable	177
4. Results of the Extension of the Meaning of Due Process of Law	182
5. Some Examples of Higher Law Concepts in Recent Supreme Court Decisions	185
VIII. NATURAL LAW DOCTRINES AID IN CHANGING THE BASIS FOR JUDICIAL REVIEW OF LEGISLATIVE ACTS	196
1. Conservative Doctrines and Judicial Review of Legislation	198
2. Underlying Purpose of the Revival of the Natural Law Philosophy in American Constitutional Law	210
3. Types of Natural Law applied in the United States	216
Appendix	232

PART IV

THE REVIVAL OF *DROIT NATUREL*, *NATURRECHT*, AND
SUPERIOR LAW DOCTRINES IN THE JURISTIC
PHILOSOPHY OF EUROPEAN WRITERS

IX. THE BACKGROUND FOR RECENT THEORIES OF NATURAL LAW AND THE GERMAN DOCTRINE OF A "RECHTSSTAAT"	237
1. Continuance of Natural Law Theories in Europe	237
2. German Doctrine of a <i>Rechtsstaat</i>	245
3. Current Views Relating to Natural Law in Germany	246
X. FRENCH THEORIES RELATING TO SUPERIOR LAW: HIGHER LAW DOCTRINES OF KRABBE	252
1. Views of Saleilles and Charmont	252
2. Views of Duguit and Hauriou	260
3. Higher Law Doctrines of Krabbe	274
XI. REVIVAL OF NATURAL LAW IN METAPHYSICAL AND THEO- LOGICAL SPECULATIONS; NATURAL LAW THEORIES AND INTERNATIONAL LAW	278
1. Natural Law Doctrines of Del Vecchio	279
2. Theological Interpretation of Natural Law by Victor Cathrein	286
3. Metaphysical Doctrines of Geny	288
4. Natural Law Theories and International Law	294
5. Theories of Natural Law Prevalent in Europe	302

PART V

SIGNIFICANCE OF THE REVIVAL OF HIGHER LAW
CONCEPTS IN THE PUBLIC LAW OF
EUROPE AND OF AMERICA

XII. OBJECTIVES IN THE MODERN REVIVAL OF NATURAL LAW THINKING	309
1. Natural Law as a Device to introduce Ethical Con- cepts into the Law	310
2. Natural Law as an Ideal or Philosophical Standard	316
3. Higher Laws to guide Judges as Legislators. ¹	323

4. Higher Law Theories as a Basis for Limits on State Sovereignty	331
5. Limits on the Power to amend Constitutions in America due to Fundamental Principles and Rights	336
6. Concluding Comments	342

BIBLIOGRAPHY	353
TABLE OF CASES	373
INDEX	381

PART I

A SURVEY OF THE DEVELOPMENT OF NATURAL LAW DOCTRINES

CHAPTER I

ANCIENT AND MEDIAEVAL NATURAL LAW THEORIES

THE conviction that there are superior principles of right, or higher laws to which the ordinary civil rules made by man must conform and which necessarily place limits on the operation of such rules, is one of the most persistent ideas in the evolution of legal thought. There have been times when the import of higher law concepts has been discredited or their directive force in legal growth has been concealed by a different terminology. But legal ideas have seldom been free from superior law influences. Though the significance of this conviction in the growth of systems of law has been examined frequently by exponents or critics of natural law theories, the consideration of the ideas therein involved never ceases to be of interest. Current tendencies in the legal thought of Europe and of America render it appropriate to review once more certain applications of these higher law concepts, and to consider their purport in giving direction to various processes of modern legal adjustments. Only some representative uses of these ideas in Europe may be considered as a basis for comparison and contrast with their pervasive applications in the public law of the United States. The best-known and most influential form of the higher law doctrines centers around the term "natural law" or "law of nature."¹

¹ For sketches of the origin of the higher law ideas in relation to "the law of nature," see John W. Salmond, "The Law of Nature," *Law Quarterly Review*, XI (April, 1895), 121; James Bryce, "The Law of Nature," *Studies in History and Jurisprudence*, II, 556; and Sir Frederick Pollock, "The History of the Law of Nature," *Journal of the Society of Comparative Legislation*, II (1900), 418-433, and *Essays in*

1. *Graeco-Roman Concepts.* Few terms in the history of law have had such a variety of meanings as the "law of nature" or "natural law." This phrase is not only used differently by writers in the same period but is also not infrequently employed in either a confused sense or with varying connotations by the same writer.¹ And, as with most legal expressions, it has conveyed divergent ideas in various stages of legal history. Because of the variety of meanings attributed to the term, efforts have often been made to discredit its use and to discard references to it in relation to legal phenomena. Thereby it was thought clear thinking might be facilitated. It remains to be seen whether such efforts have attained the desired object. A summary of some of the more common uses of this term forms a necessary background for a consideration of the modern revival of natural law thinking.

(There have been times when the term "law of nature" has been thought of as comprising a customary law of divine origin.) Such a divine origin of law tended in early Greece to foster a distinction between laws which were fundamental as in accordance with nature or ancient custom, and the conventional rules resulting from ordinary human enactments.²

the Law (London, 1922), chap. 2. Reprinted in *Columbia Law Review*, I (January, 1901), 11. See also Guilio de Montemayor, *Storia del diritto naturale* (Naples, 1911).

The historical background of natural law concepts has been so frequently analyzed that it seemed unnecessary to attempt to retrace it again, and it is not the purpose of this study to treat in detail the evolution of such ideas. A succinct summary will indicate the stages through which natural law concepts have passed since the time of the Greeks.

¹ Among the most common ideas involved in the word "natural," when used in such phrases as "natural justice," "natural right," and "natural law" are: rational; reasonable; in accordance with nature; in agreement with ancient customs; just; equitable; divine, or in accord with the will of God; ideal, as differentiated from the actual; appropriate; and, necessary. For a summary of the various ideas involved in the term "natural" in this connection, see B. F. Wright, Jr., "American Interpretations of Natural Law," in *American Political Science Review*, XX (August, 1926), 542, 543.

² For an account of the evolution of Greek ideas relating to natural law, consult E. Bury, *Essai historique sur le développement de la notion de droit naturel dans l'antiquité grecque* (Trevoux, 1908). Cf., especially, for natural law ideas of Sophocles, of Socrates, and of Plato.

The distinction between the laws made by man and laws which are in accordance with nature or of divine origin may be traced in the works of many Greek writers.¹

Throughout much of Greek thought there was a contrast between *φύσις* (or *phusis*) — a process of growing in the physical sense, and *νόμος* (or *nomos*) — man's formulation of rules regarding such growth.² Early Greek philosophers speculated chiefly about the physical universe, but the Sophists directed attention toward the state and its relations to individuals.³ With the Sophists the man-made *nomoi* were likely to be contrasted with the universal laws emanating from the gods.⁴ Sophocles, who refers at various times to the notion of higher laws, has Antigone say, in defence of the charge that she had wilfully disobeyed the king's orders: "Nor deemed I that thy decrees were of such force, that a mortal could override the unwritten and unfailing statutes of heaven. For their life is not of today or yesterday, but for all time, and no man knows when they were first put forth."⁵

¹ See Burle, *op. cit.*, beginning at chap. 2. (The Pythagoreans taught that "law ought to be in conformity with nature and it will be if it is made in the image of natural law which attributes to each according to his merit" (*ibid.*, p. 86). For the views of the Sophists see *ibid.*, pp. 103 ff. Greek philosophers, it is observed, constantly referred to an eternal law, the reason of a supreme being, and absolute and immutable law, which it was the duty of the public authorities to recognize and enforce in defining the relations and duties of human beings. In the Socratic philosophy an act which resulted in injustice had only the appearance of a law (*ibid.*, p. 157).

² John L. Myres, *The Political Ideas of the Greeks* (New York, 1927), p. 270. For reference to the antithesis between the two concepts, see Ernest F. Barker, *Greek Political Theory: Plato and His Predecessors* (London, 1918), pp. 64 ff. See also Gilbert Murray, "The Stoic Philosophy," in *Essays and Addresses* (London, 1921), pp. 96, 97.

³ "The principal problem examined by the Sophists in regard to jurisprudence was how far the basic laws of society can be regarded as ingrained in the nature of things, and how far they are merely artificial establishment." Sir Paul Vinogradoff, *Outlines of Jurisprudence*, vol. II, *The Jurisprudence of the Greek City* (London, 1922), p. 26. Vinogradoff thinks the contrast between *φύσις* and *νόμος* may be traced to Demokritos (*ibid.*, pp. 26 ff.).

⁴ Xenophon, *Memorabilia*, 4. 4. 19; Walter Eckstein, *Das antike Naturrecht im sozial philosophischer Beleuchtung* (Wien und Leipzig, 1926), chap. 11.

⁵ Sophocles, *Antigone*, pp. 450 ff.

(The distinction between natural law, which is universal and divine, and positive law, which is local and human, is attributed to Hippias by Plato in the *Protagoras*.¹) As politics and ethics were to the Greeks nothing more than two phases of the same formula it was to be expected that chief interest would be manifested in the ethical phases of the natural law concept. The Greek idea of law being primarily "a coherent interpretation and reasoned revision of custom" it was inevitable that principles and rules of reason should predominate in this interpretation.²

Aristotle put the distinction between fundamental and ordinary laws into a standard formula which has greatly influenced subsequent legal thought. To Aristotle justice was either natural, as in accordance with nature, and hence universal; or local and conventional, as applicable to a particular place.³ The higher law, as Aristotle conceived it, was unwritten, universal, eternal and immutable, and in accordance with nature. He divided law into that which is common, being in accordance with nature and in force everywhere, and that which is peculiar to each separate community. When an advocate was pleading a cause and found the positive law was against him, Aristotle suggested that he might then appeal to the law of nature as rendering the act void.⁴ Thus a basis was laid in philosophic thought for a dualism between the customary, natural, and universal in law, and the local, conventional, and ordinary enactments of a separate group of men. It was this dualism to which mediaeval thinkers recurred when they sought to contrast the natural

¹ Barker, *op. cit.*, p. 64.

² Cf. Myres, *op. cit.*, p. 47; Eckstein, *op. cit.*, chaps. 2, 3.

³ *Nicomachean Ethics*, 7; Burle, *op. cit.*, chap. 14. There is, Aristotle maintained, a natural law anterior to the positive laws and from which the latter take their origin. To render a political order stable there must be administered in it a justice independent of arbitrary rules or of human enactments and superior to every individual interest (*ibid.*, pp. 178 ff.; Bryce, *op. cit.*, pp. 567, 568; Salmond, *op. cit.*, p. 127).

⁴ *Rhet.* 1375, a, 27; Bryce, *op. cit.*, p. 567; Eckstein, *op. cit.*, chap. 5.

and divine laws with the civil laws of a particular time and place, and to which later jurists have turned when some standard was sought to test the value or efficacy of existing positive laws.

The Greeks perceived rather vaguely the ideal of fundamental laws as now understood and they instituted a unique plan for the guardianship of such laws. This was in the form of an action against the proponent of a measure or an action to secure annulment of the act. If the action was instituted within one year of the enactment of the law, proceedings could be brought against the proponent of the measure, but if instituted later the process applied only to the annulment of the law. The action might be brought "for infringement of legal rules, neglecting forms of procedure or some regulation bearing on the legislative process."¹ In their efforts to establish a rule of law based on the ancient customary rules the Greeks regarded certain laws of such permanence that it was a matter of serious public concern to change them.² (The idea of the sovereignty of law was one of the fundamental principles of Greek thought;³) it prevailed widely during the Middle Ages; and it was transmitted to modern times in the form of theories of the supremacy of law or of the reign of law.

Though the Greeks were among the first to formulate ideas of natural law the Romans made more use of such theories and put their views along this line into more enduring forms. The first indications of the application of this concept are to be found in the work of the praetors. In the development of a law relating to the commercial dealings between citizens and

¹ Vinogradoff, *Jurisprudence of the Greek City*, p. 138.

² Cf. also G. M. Calhoun, "Greek Law and Modern Jurisprudence" in *California Law Review*, XI (July, 1923), 308, and D. Goodell, "An Athenian Parallel to a Function of our Supreme Court," in *Yale Review*, II (May, 1893), 64.

³ See Plato, *The Laws*; also Ernest Barker, *op. cit.*, chap. 15. To Plato the rule of law meant that every authority in the state was exercised under a code of laws which was definitely established and which was fundamental. In the *Republic* and the *Politicus* Plato rejected to a certain extent this idea of the sovereignty of law.

aliens, where formerly only the principle of *bona fides* or good faith prevailed, the *praetor peregrinus* gradually built a legal system based on reason and common sense.¹ The praetor, by means of the edict and through his right to refuse an action worked out an equitable law — the *jus gentium* — which tended to displace the rigors of the *jus civile*.² It was in this connection that the doctrine of *jus naturale* became associated with the growth of the Roman law. Though *jus naturale* was seldom used in this period of Roman law the term served to give sanction to the *jus gentium* as a universal system of law which was gradually superseding the *jus civile*.³ Thus principles of natural law or natural justice found their expression in the hands of the judge and the practical administrator rather than in the writings of political philosophers. It is interesting to see that at times when legal thinkers attached little weight to such principles they formed convenient sources for the extraction of new legal ideas by those who found the law too harsh and too formalistic in its applications.

As the Roman law developed into a coherent system the three main sources of its growth were legislation, administrative edicts, and juristic reasoning. It was in juristic reasoning that natural law concepts were extensively used, for the authority of the opinions of the jurists in their responses depended upon the reasonableness of their comments.

As a basic concept for a *jus gentium* or universal law, natural law was extensively applied in connection with the Stoic philosophy and with the application of Stoic principles in the Roman law.⁴

Zeno, the founder of Stoicism, has a remarkable passage extolling natural law as the eternal and universal law of God

¹ Sohm's *Institutes*, 3d ed., trans. by J. C. Ledlie (London, 1907), pp. 64 ff.

² *Ibid.*, p. 79.

³ W. W. Buckland, *A Textbook of Roman Law from Augustus to Justinian* (Cambridge, 1921), p. 54.

⁴ W. W. Buckland, *A Manual of Roman Private Law* (Cambridge, 1925), pp. 28 ff. The Romans, it is observed, were influenced "by the Stoic conception of life

governing and directing all things.) The Stoics emphasized the ethical side of Aristotle's conception of natural justice and considered it as a guiding principle immanent in the universe. This immanent principle was reason and its expression was natural law.¹ To Cicero, who became an advocate of Stoic doctrines, the law of nature became the source and limit of all rights.² The best exposition of Cicero's view is as follows:

Of all these things respecting which learned men dispute there is none more important than clearly to understand that we are born for justice, and that right is founded not in opinion but in nature. There is indeed a true law (*lex*), right reason, agreeing with nature and diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding. . . . It is not allowable to alter this law nor to deviate from it. Nor can it be abrogated. Nor can we be released from this law either by the senate or by the people. Nor is any person required to explain or interpret it. Nor is it one law at Rome and another at Athens, one law today and another hereafter; but the same law, everlasting and unchangeable, will bind all nations and all times; and there will be one common lord and ruler of all, even God, the framer and proposer of this law.³

To Cicero civil laws were merely the application of this

according to nature with its corollary of a natural law — rules of conduct implanted in man by nature. This notion of a *jus naturale*, principles intuitive in man, his very nature, and capable of universal application appears frequently in Roman sources. Occasionally it is declared to be a principle on which all law rests, but the habitual attitude of the Roman lawyers is different: *jus naturale* is the ideal to which it is desirable that law should conform, but it was not really at any time a test of the validity of a rule of law." Cf. also Buckland, *A Textbook of Roman Law from Augustus to Justinian* (Cambridge, 1921), pp. 53 ff.; R. W. and A. J. Carlyle, *A History of Medieval Political Theory in the West* (New York and London, 1903), I, 36 ff.; M. Voigt, *Die Lehre vom jus naturale, aequum et bonum und jus gentium der Römer* (Leipzig, 1856), secs. 52-64 and 89-96; and Theodor Kipp, *Geschichte der Quellen des römischen Rechts*, 4^o ed. (Leipzig, 1919), pp. 14 ff.

¹ For an analysis of the original Stoic concepts of a "law of right reason" see Burle, *op. cit.*, pp. 399 ff., and Eckstein, *op. cit.*, chap. 7.

² Cicero was, of course, not presenting original ideas but was putting into current phraseology some of the commonplace political ideas of the time. "The theory of natural law is to Cicero the form of the theory of justice in society, and it is also the groundwork upon which the whole structure of human society rests." Carlyle, *op. cit.*, I, 6.

³ *De Legibus* II, 4, 10; Carlyle, *op. cit.*, I, 3 ff.; cf. Salmond, *op. cit.*, pp. 127 ff. and Bryce, *op. cit.*, pp. 568 ff.

eternal natural law. He also emphasized the natural equality of men in contrast with the Aristotelian theory of inequality and thus foreshadowed one of the interesting ideas of the Roman jurists. The Ciceronian conception of the law of nature was to exert a formative influence on legal thought for the succeeding centuries, but it was modified in its transmission by the form into which the concept was put by the Roman jurists and incorporated in the *Digest* and *Institutes* of Justinian. The Roman lawyers accepted the Greek conceptions of natural justice and natural law and applied them as a means of legal reform. To these conceptions may be traced some of the significant ideas of the Roman law relating to equity. Gaius considered the *jus naturale* as virtually equivalent to the *jus gentium*, which was recognized through reason as a body of principles, universal and equitable in their applications.¹ For him natural law was a body of principles recognized through the reason as useful and just.

Ulpian and other Roman jurists seemed vaguely to distinguish between the *jus naturale* and the *jus gentium*, the former partaking more of the primitive and instinctive rules applicable to all life, and the latter, of the conventional rules of mankind at a given time and place.² Thus the later Roman jurists regarded slavery as contrary to the *jus naturale*, since men by the law of nature are born free and equal,³ but as

¹ "That law which any people establishes for itself is peculiar to itself, and is called the civil law (*jus civile*), as being the particular law of the state (*jus proprium civitatis*). But that law which natural reason has established for all men, is observed by all peoples alike and is called the law of nations (*jus gentium*), as being that which all nations use." From Introduction to *Commentaries* of Gaius. Carlyle, *op. cit.*, I, 37 ff.

² *Ibid.*, pp. 39 ff. Pollock thinks that Ulpian's distinction was not generally understood by the Roman lawyers of his day and that its incorporation into the *Digest* and the *Institutes* gave it a currency quite beyond its intrinsic merit. Cf. Appendix to Maine's *Ancient Law* (New York, 1906), pp. 399, 400, and *Essays in the Law* (London, 1922), pp. 36-38.

³ *Digest* 1, 1, 4. On the relations between the *jus naturale* and *jus gentium* in Roman law see Pollock, "History of the Law of Nature," in *Essays in the Law*. By the Roman lawyers, Ulpian, Tryphoninus, and Florentinus, men are considered by nature free and equal. *Quod ad jus naturale attinet, omnes homines aequales sunt.*

sanctioned by the *jus gentium*. By the time of Justinian the *jus naturale* had come to mean a body of ideal principles which men could rationally apprehend and which included the perfect standards of right conduct and of justice.¹ The compilers of the *Institutes* attempted to discriminate between the rules and instincts common to animals — the *jus naturale*; rules common to all mankind — the *jus gentium*; and the particular rules of a community — *jus civile*.

This classification, though merely suggested by Roman commentators, was followed with scrupulous care by certain mediaeval jurists.² Later civilians, like the older jurists, used natural law vaguely and sometimes in an ambiguous way, referring perchance to rules arising from animal instincts, to a common law created by man and corresponding to the *jus gentium*, or in Christian thinking to the laws of the Bible. But from some statements in Justinian's *Institutes* Carlyle concludes that "by the sixth century the phrase was certainly taking that meaning which it has throughout the Middle Ages and later — that is, that the *jus naturale* means that body of principles of justice and reason which men can rationally apprehend, and which forms the ideal norm or standard of right conduct and of the justice of social institutions."³ All were agreed that natural law was immutable and not subject to change by civil enactments. It is well to note that two ideas which become promi-

1. 17. 32. *Cum jure naturali omnes liberi nascentur*. *Dig.* 2. 1. 4; also 2. 5. 4. Cf. Carlyle, *op. cit.*, I, chap. 5; and Albert Vaunois, *De la notion du droit naturel chez les romains* (Paris, 1884), especially chaps. 1, 2.

¹ E. D. Dickinson, *The Equality of States in International Law* (Cambridge, 1920), pp. 16, 17. For reference to the Greek origin of the phrase in Justinian's *Digest*, that this is law, to which it is proper that all men conform (*Digest*, 1. 3. 2), see John L. Myres, *op. cit.*, pp. 309 ff.

² Carlyle, *op. cit.*, II, 28 ff. For opinions holding that imperial rescripts contrary to natural law are void, see *ibid.*, pp. 32, 33. The Greeks and the Romans seldom conceived of legal rights inhering in the individual and hence they did not formulate notions of natural rights. On this distinction, see J. Walter Jones, "Acquired and Guaranteed Rights," *Cambridge Legal Essays* (London, 1926), pp. 223 ff.

³ Carlyle, *op. cit.*, I, 74, 75.

nent in the later stages of the growth of natural law concepts, namely, a primitive state of nature and, arising therefrom, a natural freedom and a natural equality, are the peculiar results of Roman legal thought in the Lower Empire. It was not until the mediaeval period, however, that the philosophy of natural law was given a dominant place in legal thinking.

2. *Natural Law in the Middle Ages.* A significant development of the concept of natural law is to be found in the Middle Ages, when the theories of Cicero and of the Roman jurists were adapted to the teachings of Christianity. In the writings of the philosophers and of the jurists of this period the concept of natural law was uppermost. The theory gained in significance by its association with the concept of a state of nature which had been recognized by some of the later Roman jurists.¹⁾

(Primary consideration was given at this time to divine laws or to what were regarded as the eternal laws of the universe, over which man had no control. But subordinate to these divine and eternal laws was the law of nature.) That the theory of natural law was given an important place in early Christian thought may be gathered from the writings of Origen, St. Ambrose, and St. Jerome. (Referring to a passage of St. Paul (Rom. ii, 12-14) they spoke of natural law as equivalent to the law of God and as universal in contrast with the written laws made by man.²⁾ But it was Isadore of Seville who formulated a view of natural law which through the *Decretum* of Gratian became a part of the Canon Law. He recurred to the analysis of Ulpian and the Roman jurists and classified law as *jus naturale*, *jus civile*, and *jus gentium* with this difference, that *jus naturale* became the common law of nations without any reference to animal

¹ An original conception of a primitive state of nature is found in the writings of Seneca. Carlyle, *op. cit.*, I, 23 ff.

² For extracts from these writers, see Carlyle, *op. cit.*, I, 104, 105.

instincts.¹ In other respects he followed closely the Roman doctrines of the *Code* and the *Institutes* and thus gave these doctrines a primary position in mediaeval legal thought.

(Gratian introduced a distinction which became basic in the Canon Law — natural law was identified with divine law and human law with custom;) the *jus gentium* and the *jus civile* were included under the latter.² “To the mediaeval canonist, then, as to the Fathers,” (says Carlyle, “the *jus naturale* is identical with the law of God, it is embodied in the ‘law and the Gospel,’ for it represents the general moral principles which God has implanted in human nature, and it is, in its essential character, immutable.”) It is true that it is set aside by some of the legitimate institutions of society, but this is to be explained as a necessary accommodation to the corrupt state of human nature, and is justified by the ultimate purpose of setting forward the principles of the *jus naturale*. The *jus naturale* is to the canonists the norm by which any law or institution must be justified.³

The great philosopher of the Middle Ages, Thomas Aquinas, distinguished the eternal and divine laws as forming a part of the universe and as emanating from God, from natural laws which were the result of the participation of man as a rational creature in applying to human affairs the eternal law by which he distinguished between good and evil. To Aquinas the particular rules of the *lex naturalis* were not immutable. As rational laws designed for human ends, they were subject to change as human conditions varied.⁴

¹ Carlyle, *op. cit.*, I, 106 ff. Cf. also, Heinrich Singer, “Das Naturrecht im Codex iuris canonici,” *Archiv für Rechts- und Wirtschaftsphilosophie*, XVI (1922-23), 206-215. Dr. Singer observes that the authors and contributors of the *Codex iuris canonici* were instructed to state the law so as to agree with the principles of natural law. An effort was made to reconcile the *jus divinum* or revealed law with *jus naturale* or rules resulting from the rational processes of man. *Ibid.*, pp. 209 ff.

² Carlyle, *op. cit.*, II, 28, 98, 102, 105.

³ *Ibid.*, II, 113; also Pollock, *Essays in the Law*, p. 40.

⁴ *Summa Theologiae*, I, 2, q. 91, art. 2 and q. 93, art. 1. The theories of Thomas Aquinas are based to a considerable extent upon the doctrines of predecessors in

The mediaeval churchmen invariably identified nature and reason with a personal God and law and rights emanated from his will. Following the method of Thomas Aquinas, the current divisions of law were: divine, natural, and positive.

Mediaeval jurists usually accepted the tripartite division of law, suggested by Roman thinkers, into natural law, law of nations, and civil law. Through commentaries on the *Institutes*, such as that of Azo, the Roman classification was applied to the peculiar conditions of the Middle Ages. In the main they used the phrase *jus naturale* as meaning a body of principles, which may be rationally comprehended and which are immutable. In due course the *jus gentium* was thought of as the customary law of mankind and the *jus civile* as the customs of a particular community.

Mediaeval legal doctrines were based essentially on superior legal concepts which regarded law in its origin as of equal rank with the state and as not depending on the state for its existence. The idea persisted for centuries that the end of the state is the attainment of justice and that civil authorities act legitimately only when they follow the principles of justice. Mediaeval thinkers believed that it was the purpose of the state to realize the ideas of law and "it was never doubtful that the highest Might, were it spiritual or were it temporal, was confined by true limitations."¹

the twelfth and thirteenth centuries whose works are usually neglected. For the contributions of some of these men consult Martin Grabmann, "Das Naturrecht der Scholastik von Gratian bis Thomas von Aquin," *Archiv für Rechts- und Wirtschaftsphilosophie*, XVI (1922-23), 12-53. Alessandro Bonnucci also traces the scholastic philosophy of natural law in *La derogabilità del diritto naturale nella scholastica* (Perugia, 1906).

Rufinus was one of the first to suggest that *jus naturale* was "a certain quality implanted in mankind by nature, which leads men to do what is good and to avoid what is evil." Carlyle, *op. cit.*, II, 103, 107.

¹ Otto Gierke, *Political Theories of the Middle Ages*, trans. by F. W. Maitland (Cambridge, 1922), pp. 74 ff.; cf. p. 172 for note by Maitland on the theories of natural law in the Middle Ages. "Men supposed," says Gierke, "that before the State existed the *Lex Naturalis* already prevailed as an obligatory statute and that immediately or mediately from this flowed those rules of right to which the State owed even the possibility of its own rightful origin. And men also taught that the highest

Customs as well as enactments in order to be valid in mediaeval times were expected to be reasonable, which for the standards of that day meant in harmony with divine reason. Estimates of reasonableness were made by a triple standard applied with varying degrees of effectiveness: (a) revelation or the laws regarded as given directly from God; (b) church law, as embodied in the papal decrees or the canonical codes; and (c) natural law, conceived as common to the natural sentiments of man.

As strengthening the mediaeval concept of the law of nature as law, it is important to recognize that in this age there was little legislation in the modern sense. Enactments were usually designed to affirm existing rules or customs or to remedy abuses in administration.¹ To the mediaeval jurists and theologians, with such exceptions as St. Augustine and St. Gregory, law was an expression of the principles of justice and all governmental agencies were subservient to these principles. So important was this factor in mediaeval life that to understand legal thought it is regarded necessary to disregard the ordinary conception of a sovereign, the commands of whom are considered as law.² Civilians thought of

power on earth was subject to the rules of Natural Law. They stood above the Pope and above the Kaiser, above the Ruler and above the Sovereign People, nay, above the whole Community of Mortals. Neither statute nor act of government, neither resolution of the People nor custom could break the bounds that thus were set. Whatever contradicted the eternal and immutable principles of Natural Law was utterly void and would bind no one. The mediaeval theory declared 'that every act of the Sovereign which broke the bonds drawn by Natural Law was formally null and void.' . . . As null and void, therefore, every judge and every other magistrate who had to apply the law was to treat, not only every unlawful executive act, but every unlawful statute, even though it were published by the Pope or Emperor." *Ibid.*, pp. 75, 84. Cf. also, Carlyle, *op. cit.*, I, 174; III, 32, 128; and Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staats-theorien*, 3d ed. (Breslau, 1913), chap. 6.

¹ C. H. McIlwain, *The High Court of Parliament and its Supremacy* (New Haven, 1910), pp. 42, 46, and "Magna Carta and Common Law" in Malden, *Magna Carta Commemoration Essays*, pp. 140, 141. See also, Theodore F. T. Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge, 1922), pp. 165 ff.

² Carlyle, *op. cit.*, III, chap. 3.

law, not as the creation of human will, but as the application of principles or customs.

Along with the almost universal belief in the divine origin of political power and with the insistence on unlimited obedience to civil rulers because their authority came from God, there was a growing demand that for kings to be assured obedience they must rule justly and according to law.¹ Such political theorists as John of Salisbury and Althusius developed the distinction between a king who ruled legitimately according to law and a tyrant, who was guided by his individual whims.² A theory of the election of rulers was advocated which would render it possible to depose a tyrant. In the theory of the election of the ruler and in the requirement that he govern justly lay the germs of the later notion of a social contract, as the foundation of civil government.

There was prevalent at this time a conception of an inflexible code, emanating from the divine will interpreted and applied through the light of reason, and from this conception came the doctrine that the higher laws of reason or of nature controlled the lower laws or enactments of man. Sometimes a distinction was made between certain immutable principles and rules derived therefrom, which were subject to change.³

¹ "Any form of government is right and just," said Aquinas, "in which the rulers seek to promote the common good, but not otherwise." A. J. Carlyle, "The Political Theories of St. Thomas Aquinas," *Scottish Review*, XXVII (January, 1896), 126, 141.

² For an exhaustive analysis of the theories of Althusius and of the "Monarchomachs," consult Gierke, *Johannes Althusius*. The whole view of the *Vindiciae contra Tyrannos*, says Laski, "is built on the assumption that it is the duty of the magistrate to represent the popular idea of right." Harold J. Laski, *A Defence of Liberty against Tyrants: A translation of the Vindiciae contra Tyrannos* by Junius Brutus (London, 1924), pp. 47, 48.

³ In the Middle Ages, says Maitland, "God Himself appeared as being the ultimate cause of Natural Law. This was so, if, with Ockham, Gerson, D'Ailly, men saw in Natural Law a Command proceeding from the Will of God, which command therefore was righteous and binding. It was so, if, with Hugh de St. Victor, Gabriel Biel and Almain, they placed the constitutive moment of the Law of Nature in the Being of God, but discovered dictates of Eternal Reason declaring what is right, which dictates were unalterable even by God Himself. Lastly it was so, if, with Aquinas and his followers, they (on the one hand) derived the content of the Law of Nature from the Reason that is immanent in the being of God and is directly deter-

In practice natural law might be referred to as a guide to interpretation or in certain instances it might be appealed to where no rule of law had been declared. All laws in conflict with natural law, it was urged, must be considered void.¹

A change in viewpoint preceding the period of the Reformation may be illustrated by William of Ockham's classification of natural law as

- (a) Universal rules of conduct dictated by natural reason.
- (b) Rules which would be accepted as reasonable without any positive law.
- (c) Rules which are arrived at by deduction from the precepts of the law of nature and are liable to change by positive enactments.²

Rules of the third class were eventually referred to as the secondary laws of nature.

3. *Theories following the Reformation.* Not until after the Reformation were philosophers able to detach natural law theories from ideas of God and to find their source in an impersonal human reason. This detachment was hastened and the doctrine of natural law was given wider currency through the writings of Albertus Gentilis³ and of Hugo Grotius.

mined by that *Natura Rerum* which is comprised in God Himself, but (on the other hand) traced the binding force of this law to God's Will." Gierke, *Political Theories of the Middle Ages*, p. 172.

¹ Thus Baldus claimed that on the authority of the law of nature neither the Emperor nor the Pope could validate the taking of usury. For interesting efforts to justify slavery and the ownership of property though contrary to the law of nature see Carlyle, *op. cit.*, I, chaps. 10, 12, 16 and II, Pt. I, chaps. 4, 5, Pt. II, chaps. 5, 6. See also, Gierke, *Johannes Althusius*, pp. 272 ff.

² Goldast, *Monarchia*, II, 932 and Gierke, *Political Theories of the Middle Ages*, pp. 172, 173. For the distinction between principal and secondary rules of the law of nature, see *ibid.*, p. 175; also, *Johannes Althusius*, pp. 273, 274.

³ To Gentilis, who with Grotius may be credited with the formulation of systematic rules of international law based largely on the law of nature, natural law comprised "such rules of justice as would govern men as moral and responsible beings, living in society independently of human institutions — in other words, in a 'state of nature.'" *De legationibus*, II, 18, and Coleman Phillipson in *Great Jurists of the World* (Boston, 1914), pp. 119, 120.

Spanish jurists in the sixteenth and seventeenth centuries, antedating the work of Grotius,¹ formulated a theory of a supreme and immutable law of nature, changeless by God himself and based on "a state of nature antecedent to the state of corruption, and thus affording the type of perfection for all actual societies."² The mediaeval theological concept of the law of nature had its culmination in the philosophy of Saurez wherein the law of nature became an inflexible code willed by God and interpreted by reason. All enactments civil or religious which contravened this law were *ipso facto* void.³ The Spanish jurists also fostered the belief in the natural rights of man, which it was the duty of the state to protect. These rights were thought to arise from a natural condition of equality in which the faculties inherent in men were to have a free opportunity for development.⁴

To Grotius, who put in a form which became more popular the theories of Vittoria, Suarez, and Gentilis, the emphasis was placed on natural right, which was "the dictate of right reason, indicating that any act, from its agreement or disagreement with the rational nature has in it moral turpitude or moral necessity; and consequently that such act is forbidden or commanded by God, the author of nature." Grotius distinguished the law of nature, which was unalterable even by the Deity, from positive law and from the law of nations⁵ and divided it into divine rules ordained by God and

¹ Edited by Ernest Nys (Washington, 1917). Cf. works of Francisco di Vittoria, *De Jure Belli* and *De Indis* (1557).

² William A. Dunning, *Political Theories from Luther to Montesquieu* (New York, 1905), pp. 132 ff.

³ *Ibid.*, pp. 13 ff. "There was also a philosophic, deductive law of nations before Grotius, resting upon the same foundations as the natural law of the schoolmen, and cultivated particularly by the Spanish moralists, especially by Francisco Vittoria and his followers." *General Survey of European Authors* (Continental Legal History Series), p. 412. For theories of a state of nature and of an original compact, cf. Suarez, *De Legibus*, III, 4, and Mariana, *De Rege*, I, 1, 2, 8.

⁴ Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven, 1922), pp. 82, 83.

⁵ Professor Dickinson, referring to the fact that the natural law theories of Grotius are often misunderstood, claims that "Grotius presented a less comprehen-

rules prescribed by man.¹ He and his successors made use of the law of nature theory in formulating the basic principles of international law,² and for a long time natural law and the law of nations were thought of as closely related.

Building on natural law as a source and sanction of legal rules mediaeval jurists laid the basis for the concept of inborn and indestructible rights belonging to the individual as such. Roman thinkers, such as Seneca, had suggested that men in their natural state were free and equal.³ The Church Fathers accepted this theory and tried to explain the differences and inequalities in human conditions as due to the fall of man and the consequent conditions of sin. Doctrines of freedom and equality were made an integral part of the law of nature by the canon lawyers. With the development of the sense of individual personality which became a feature of Christian thought during the Middle Ages and was fostered by church reformers, similar ideas were considered a part of an individual's right and heritage. To ecclesiastical thinkers men were equal in the eyes of God; to the anti-clericals they were equal in the eyes of men.⁴

sive discussion of natural law than either Suarez before him or Pufendorf who came after." *The Equality of States in International Law*, p. 43. The law of nature which these men found, Pollock observes "was no mere speculative survival or rhetorical ornament. It was a quite mediaeval theory. What is more, it never ceased to be essentially rationalist and progressive. Modern aberrations have led to the widespread belief that the law of nature is only a cloak for arbitrary dogmas or fancies." *Essays in the Law*, p. 32.

¹ Cf. *De Jure Belli ac Pacis*, Book I, chap. 1.

² For indications of the use of the doctrine of natural law and natural rights by jurists and text writers in formulating principles of international law, see Grotius, *op. cit.* (1672); Pufendorf, *De Jure Naturae et Gentium* (1672); Burlamaqui, *Principes du droit naturel* (1758); Rutherford, *Institutes of Natural Law* (1754-56). The natural law doctrine that contracts are binding was in Grotius' opinion a limitation on the authority of sovereigns. Grotius, *op. cit.*, Book III, chap. 24.

³ Referring to the ancient origin of the idea of equality, Professor Radin observes that "the East gave to Rome both the practical fact of inequality, fixed into unescapable *ordines* and regulated by the needs of the state, and the corrective ideal of a perfect city of equals living in accordance with a Law of Nature." "Roman Concepts of Equality," *Political Science Quarterly*, XXXVIII (June, 1923), 288.

⁴ "Every one in a state of grace," thought Wycliffe, "has real lordship over the whole universe." *De Civili Dominio* (ed. by R. L. Poole), pp. xxii-xxiv.

In the natural law of this period lurked the germ of revolution, for on the basis of these precepts the whole structure of the state was subjected to criticism from the rationalist point of view. Catholics vied with Protestants in formulating a philosophic background for limiting the powers of the state.¹ To both, the primary rules of natural law were above all earthly rulers. The law of nature used by the church to support the Catholic morals and faith was found to be a convenient weapon to oppose the church in setting over against canonist decrees the rules of life discovered by human reason. In the conflict between the Empire and the Papacy, then, both disputants made frequent use of the law of nature.

Mediaevalists agreed on the existence of natural law; they differed merely as to its force and effectiveness. To some a statute or an executive act which violated natural law was void; to others, interested either in the claims of kings and princes to be sovereign in the civil domain or in the idea of popular sovereignty, natural law comprised guiding principles, directive only in the processes of lawmaking.

At the same time that men were engaged in discovering new grounds for limiting political authority, an ingenious Frenchman, following the lead of the Italian, Machiavelli, was formulating a theory of sovereignty which was destined to leave small place for the laws of nature. Recognizing a condition wherein the state as represented by an absolute king accountable only to God was claiming omnipotent authority, Jean Bodin developed a theory of sovereignty suitable to the times. To him the sovereign must be absolute

¹ Harold J. Laski, *op. cit.*, Introduction, and Pollock, *Essays in the Law*, p. 50. For the way in which the leaders of the Reformation built on the political ideas of the church theologians, such as the theory of the social contract, the sovereignty of princes, etc., see Jean Brissaud, *The History of French Public Law*, trans. by James W. Garner in Continental Legal History Series (Boston, 1915), p. 536. With the exception of Bodin, Hobbes, and Bossuet, he notes, most political writers followed the theories of natural law and attempted to justify political power on the basis of the idea of justice.

and can be fettered by no human laws. He admitted that there were superior laws of morality and religion to which princes were bound but for breaches thereof they were accountable to God alone. Thus Bodin furnished the broad outlines of a theory which was accepted and elaborated upon by Hobbes, Spinoza, and Austin. Later developed by modern schools of legal philosophy it ultimately weakened the respect for, and largely replaced the law of nature theories of mediaeval times.¹

"Natural law," "natural rights," and "natural justice," during most of the Middle Ages, were terms which were often used interchangeably. Thomas Hobbes undertook to distinguish between *jus naturale* as a natural right and *lex naturalis* as natural law. To him a natural right was a liberty possessed by every man in a state of nature, of doing what seemed best for the preservation of his existence. Natural law, on the other hand, was a body of principles or restraints which were devised by reason to make life secure.

The philosophy of Bodin, Hobbes,² and Spinoza tended to discredit the old natural law ideas and to make the state the sole source of law. They repudiated the legal significance of the "idea of natural law which aimed at finding a higher written law, above the rule promulgated by the state, to which this rule must accommodate itself so far as it aims to be, not a mere command of force, but an ordinance of justice."³ They were formulating a basis for a doctrine of state omnipotence which was eventually to become one of the dominant dogmas of modern political thought.

¹ See William S. Holdsworth, *History of English Law*, IV (London 1922-25), 190 ff., and Dunning, *op. cit.*, chap. 3. Cf. Gierke, *Johannes Althusius*, pp. 299 ff., on the doctrine of *Staatsraison*, which tended to weaken the limitations on the state attributed to divine and natural laws.

² Despite his positivist tendencies Hobbes regarded natural law as eterna land immutable. *Leviathan*, chap. 15; cf. Pollock, *Essays in the Law*, pp. 59, 60.

³ *General Survey of Events, Sources, Persons and Movements in Continental Legal History*, Continental Legal History Series (Boston, 1912), p. 415.

Samuel Pufendorf followed Grotius in separating the law of nature from theology and in regarding most of the law of nature as the dictate of right reason determining what is right and wrong in human conduct. The natural rights philosophy was put into its most systematic form in the works of Pufendorf.¹ Foremost in his system were the natural rights of the individual, independent of society and of the state, arising from a condition similar to Seneca's primitive state of nature. The law of nations was regarded merely as a fragment of natural law. There was the foundation here for what has been called "the unruly emphasis on rights" which culminated in the French declaration of 1789.

Locke regarded the law of nature as a body of rules for the conduct of men in their natural condition. Reason, Locke considered as the interpreter of this law; equality, its fundamental condition. Conceiving men as existing in a state of nature Locke constructed his doctrine of natural rights which belong to man in the pre-political state. These rights were life, liberty, and property.² Legislatures were bound to rule, in his judgment, according to the law of nature and to carry on their functions by fixed and general laws rather than by arbitrary decrees; and laws which transgressed certain fundamental principles were not laws "properly so-called."³ There seems to be a warrant here for the opinions

¹ On Pufendorf and the development of the law of nature, consult Coleman Phillipson's account in the *Great Jurists of the World*, pp. 311 ff.; also Gierke, *Johannes Althusius*, pp. 300 ff.

² John Locke, *Second Treatise of Civil Government*, Book II, sec. 6. "The state of nature has a law to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions."

³ John Locke, *op. cit.*, chap. 11. "These are the bounds which the trust, that is put in them by the society and the law of God and nature, have set to the legislative power of every commonwealth, in all forms of government. First: They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court, and the countryman at plough. Secondly: These laws also ought to be designed for no other end ultimately but the good of the people. Thirdly: They must not raise taxes on the property of

of American justices that acts of the legislature which are arbitrary, though not expressly prohibited, may nevertheless be void because not "legislative in character." Locke's ideas relating to the social compact, government under the law of nature, popular sovereignty, the right of revolution, and natural rights superior to the government and civil laws, were to reappear in constitutions, laws, and judicial decisions in phrases adapted to American legal thinking.

Thus the dualism of Aristotle had taken definite form. There was an immutable law which was of divine origin or the product of right reason, but whatever its source it was common to all men and universal. And there were positive enactments which were made by man to meet the contingencies of the moment. The two systems were in constant conflict — one a perfect and rational order and the other an imperative and positive one.¹

Natural law, emanating from the divine will or from divine reason, consisted only of certain basic principles. Positive law elaborated this natural law and through practical reason adapted it to the ordinary activities of life. Differing from the idealistic interpretations of the concept in Greece and in Rome natural laws were conceived as norms and positive laws that were not in accord with the natural law were unjust and therefore had no validity, though the means to prevent their enforcement were not always at hand. Thus a criterion

the people without the consent of the people, given by themselves or their deputies. . . . Fourthly: The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." *Ibid.*, chaps. 11, 18, and *Discourses Concerning Government*, III, sec. 11. John Neville Figgis, *The Divine Right of Kings* (2d ed., Cambridge, 1922), p. 242, "The more closely Locke's treatise is studied, the more clearly will it be seen that it is an attack directed far more against the idea of sovereignty, than against the claims of absolute monarchy."

¹ Cf. J. Castillejo Duarte, "Kohler's Philosophical Position," Appendix to Kohler, *The Philosophy of Law*, trans. by Adalbert Albrecht in *Modern Legal Philosophy Series* (Boston, 1914), XII, 335.

was available to measure, in a theoretical way at least, the validity of civil enactments.¹

4. *Types of Natural Law Ideas in Ancient and Mediaeval Times.* It is difficult to classify the various types of natural law theories which prevailed in ancient and mediaeval times, but it seems essential to undertake a tentative classification.

With the early Greeks natural law was law in accordance with nature in the physical sense, similar to the laws of the natural sciences in modern terminology. Such a meaning of the laws of nature has been seldom referred to since the time of the Greeks, though it has had counterparts in Ulpian's laws common to all animals, in the eternal laws of Aquinas from a quite different setting, and in a curious medley of ideas in the nineteenth century, when natural law comprised a résumé of ideas relating to the physical universe, of moral and ethical concepts, and of legal doctrines and principles.

Natural law was also considered as divine in origin and either comprised rules given to man by the Deity or his representatives or consisted of divine law from which principles of right and justice might be deduced by man's reason. This source of natural law only incidentally mentioned by the Greeks became to the theologians of the Middle Ages its main origin and sanction. Following the authoritative presenta-

¹ Cf. J. Castillejoy Duarte, "Kohler's Philosophical Position," XII, 352, 353.

"The exponents of the law of nature are not always at one in every particular, but their fundamental conception is that 'Nature' represents the supreme, unifying, controlling power manifesting itself in the universe at large; and that 'Reason' is a special aspect of this principle looked at from the point of view of man and the operation of his mental and moral faculties. In so far as men are men they possess common elements; and in their political and social life these elements inevitably emerge and are recognizable in custom and law. Hence the substratum of this law is thought to be of necessity established by the universal guiding force, personified as nature. Such natural law represents the permanent portion of human law in general, and it is prior and superior to positive legislation, which is only a supplement thereto demanded by changing circumstances in different localities. Conventional justice may well elaborate or extend its applications, but must not alter its essential content or violate its spirit." Coleman Phillipson, in *Great Jurists of the World*, p. 311.

tion of this view by Thomas Aquinas and other mediaeval theologians it has continued as the accepted view of Catholic jurists and of others who have chosen to emphasize the religious factors in the processes of lawmaking. Believers in this type of natural law may be found in all countries wherein the philosophy and traditions of the Middle Ages are fostered by religious and ethical agencies.

The Greeks also set a standard for a natural law of an idealist type — comprised of universal and immutable principles apprehended chiefly by philosophers and jurists. It was a law which reasonable creatures were everywhere bound to obey. Positive laws to have validity emanated from the ideal natural laws. This type of natural law was closely related to the current ideas of religion and morality and became prominent in Stoic political thought. During the Middle Ages it was conceived as an absolute law of reason which on account of its rational basis binds all reasonable beings.

Differing in certain respects from the immutable natural law of the Stoics, a type of natural law was formulated by ancient and mediaeval thinkers which was comprised of rules or principles of law and justice, divorced partially, at least, from divine origins. These were sometimes referred to as the unwritten laws ingrained in the hearts of men. Such principles were used by the praetors and jurists in rendering decisions which were just and equitable, and in adapting the rigid formulas of the *jus civile* to form the *jus gentium*. It was this kind of natural law — principles of common law recurring among different nations — on which international law and certain parts of developing public law were based in the sixteenth century. It is a type which is always present in the practical applications of the law where it is molded to accord with advancing notions of morality in human conduct. Stripped of some of its immutable characteristics, its modern

use may be found in the principles of reasonable conduct applied in English law and in the authority accorded the judges in certain European countries to fall back on principles of reason and justice to fill gaps in the law. Continental jurists also make frequent use of the rationalist form of natural law to measure the efficacy of existing positive enactments. It thus becomes the prototype for a "natural law with a variable content." The main trend of ancient and mediaeval theories of natural law, as Pollock suggests, was rationalist and progressive in its implications.

There was also a natural law arising from an original and primitive state of nature from which men derived natural rights — such as rights of equality and freedom. To the mediaevalists this state of nature corresponded to the condition of men before the origin of sin. Sometimes these rights were regarded as an inheritance of the individual from his birth and of such significance that it was the prime duty of the state to protect them. The Reformation encouraged the tendency to consider such rights as natural and as belonging to the individual as such. It remained for the English, French, and American philosophers to make them the foundation of civil government.

Natural law was also conceived as a theoretic foundation for axiomatic truths from which a system of positive law could be deduced. From this viewpoint the *lex naturalis* existed prior to the formation of the state and from it directly or indirectly came all legal rules.

It would be a mistake to think that the different types of natural law were either clearly defined by ancient and mediaeval writers or were formulated in such a way as to be readily differentiated. Most of the ideas relating to natural law, then as since, were vague and theories often involved a confusion of ideas which make it almost impossible to attempt any classification of views. Certain trends are evident,

however, which may be indicated. And, above all, it is apparent that, owing to the continual efforts to contrast the natural and the conventional, the ancient and mediaeval periods furnished rich soil for the germination of natural law concepts.

Natural law theories had passed through a cycle from the ideal and philosophical form of the Greeks and Romans to a standard, presumedly derived from divine sources, which the mediaeval canonists used as a criterion to measure the validity of the acts of civil and secular rulers, and thence to a series of rationalist concepts forming a basis for international law and for other branches of civil law.¹ As an ideal not wholly divorced from its divine connotations natural law was not infrequently called upon to measure the reason, necessity, or convenience of the beginnings in the way of modern legislation. The cycle was barely completed when a new turn in legal and political speculation changed the course of natural law thinking and gave a marked impetus to the emphasis upon certain higher law concepts. As the new meaning accorded to these concepts resulted from the social and political developments in England, in America, and in France, it is necessary to trace briefly the course of the development of natural law doctrines in these countries.

¹ Georges Davy, *Le droit, l'idéalisme et l'expérience* (Paris, 1922), pp. 41 ff.

CHAPTER II

ENGLISH HIGHER LAW DOCTRINES

THE traditional view of English legal historians was that in English law there are relatively slight traces of the influence of the Roman law or of its mediaeval offshoot, the canonical codes. It was taken for granted, therefore, that the ancient and mediaeval concepts of natural law, though occasionally referred to by English text writers and judges, were never accepted in any authoritative way as principles of English law. Recent investigations in English legal history have modified to some extent the traditional views regarding the acceptance of Roman law principles and have tended to indicate some important connections between the main currents of continental legal thought and the emerging common law of England.¹ And we are now assured that one of the main connecting links between the two legal systems was the doctrine of the law of nature or law of reason of ancient and mediaeval times.

¹ C. H. McIlwain, *The High Court of Parliament and its Supremacy* (New Haven, 1910). Sir Frederick Pollock thinks "there is a real link between the mediaeval doctrine of the law of nature and the principles of the common law. It is given by the use — correct in both systems, though constant, indeed exclusive in the Common Law, and rather sparing in the Canon Law — of the words 'reason,' and 'reasonable.'" *Essays in the Law*, p. 57; see also Holdsworth's *A History of English Law*, II, 133 ff. for a modern interpretation of the adoption of Roman law ideas in English law.

"English as well as Continental jurists and judges," says Professor H. D. Hazeltine, "were under the influence of doctrines which ascribed the *jus divinum* and the *jus naturale* the quality of immutability and rendered the man-made positive law opposed to them null and void. Bracton writes under the influence of these doctrines; and the early common lawyers treat the common law itself as the embodiment of the *jus naturale* in the guise of 'reason.'" Preface to Theodore F. T. Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge, 1922), p. xxiii.

1. *Natural Law Ideas and English Doctrines relating to Fundamental Laws.* In the processes by which Anglo-Saxon and Norman customs were transformed into law, may be traced the growth of ideas relating to a superior law in England. Authorities do not agree, however, as to the significance of higher law concepts in the development of English law. Certain authors maintain, with Professor McIlwain, that customary laws with no assignable beginning and accepted as a rule without question, in the course of time acquired

a character of inviolability; and whether this inviolability be the result or the cause of the preservation of these customs, the feeling has somehow come into existence that there is a law fundamental and unalterable, and rights derived from it indefeasible and inalienable. The content of the law may not be definite, — in England it was always far from definite, — but the idea has lodged itself in men's minds as a formative principle, and once lodged it colors everything.¹

This idea though vague and indefinite in outline was at times, they assert, a significant force in the development of law in mediaeval England,² and as a result of it certain principles of mediaeval customary law were thought to be beyond the power of Parliament to change, and were likely to be identified with the law of nature.³ A few provisions of

¹ C. H. McIlwain, *op. cit.*, pp. 51, 52. See also Sir Paul Vinogradoff, "Magna Carta Chapter 39," Malden, *Magna Carta Commemoration Essays*, p. 85.

² McIlwain, *op. cit.*, p. 53. McIlwain continues: "There is a fundamental law which binds a king and beyond which he may not go. The principle has persisted through all changes. . . . Men may not always have been clear as to what particular rights or liberties were guaranteed by the fundamental law, but as to the existence of such a law there was no doubt, and any act that violated it was in a true sense felt to be no law." *Ibid.*, pp. 57, 63. For the use of the term "common law" as signifying in a real sense a fundamental law, cf. McIlwain, "Magna Carta and Common Law," in *Magna Carta Commemoration Essays* (London, 1917), pp. 122 ff. and 175 ff. This judgment is not in accord with the opinions of a number of English legal historians, who regard the theories of a fundamental law, which is superior to the King and to Parliament, as having little evidence to substantiate them, so far as the actual operation of the law in England is concerned.

³ McIlwain, *The High Court of Parliament and its Supremacy*, p. 99. Expressing the view that the omnipotence of the British Parliament, on which English jurists have usually built their theories of sovereignty, is really exceptional, Sir Frederick

Magna Carta were occasionally referred to as fundamental and immutable.

William E. Holdsworth,¹ William S. McKechnie,² Edward Jenks,³ and L. O. Pike⁴ have questioned the great claims made for Magna Carta as a charter for constitutional government and have emphasized that the barons who forced the King's signature to the document "were guided by class interests and aimed at reaction and anarchy rather than at legality and progress." Vinogradoff⁵ thinks that these historians fail to explain the reasons for the great influence of the document on the national life of England and why it became the watchword of English legalism. He believes that the feudal interpretation of the Charter fails to take into account sufficiently that certain provisions tended to impress upon all the necessity of the appreciation of the rule of law in ordinary legal relations and to carry over this idea from the class justice of the feudal lords to the common law of the growing commonwealth.⁶ At least there are some vague general statements which appear to consider Magna Carta in the nature of a superior law.⁷

Whether or not these ancient customs and the written

Pollock says: "The omnipotence of Parliament was not the orthodox theory of English law, if orthodox at all, even in Holt's time. It was formally adopted, and then not without lip-service to natural law, in Blackstone's *Commentaries*. Sir Thomas Smith had asserted it plainly enough two centuries before Blackstone; but he spoke the mind of the Tudor councillors of state, not the judges and serjeants. Down to the Revolution the common legal opinion was that statutes might be void as 'contrary to common right'—an insular version, as I have pointed out elsewhere, and generally received natural law." "A Plea for an Historical Interpretation," *Law Quarterly Review*, XXXIX (April, 1923), 165. See also the *Expansion of the Common Law* (London, 1904), p. 123.

¹ *A History of English Law*, II, 207 ff.

² *Magna Carta* (New York, 1915).

³ "The Myth of Magna Carta," *The Independent Review*, IV (1904-05), 260 ff.

⁴ *Constitutional History of the House of Lords* (London, 1894).

⁵ Sir Paul Vinogradoff, "Magna Carta Chapter 39," *Magna Carta Commemoration Essays*, p. 79.

⁶ Vinogradoff, *op. cit.*, pp. 84, 95.

⁷ Cf. citations in Rodney L. Mott, *Due Process of Law* (Indianapolis, 1926), chap. 3.

provisions of the Great Charter had the characteristics of fundamental laws which were not subject to change by statutes is a controversial matter which need not be determined here. It will suffice to note that as a result of a careful study of the *Yearbooks* Mr. Plucknett concludes that the examples which Professor McIlwain cites to sustain his contention that there were fundamental laws in England in the mediaeval period "afford no support for the thesis of a supreme, fundamental law."¹ Whatever conclusion may be arrived at in this controversy there is substantial agreement among the authorities that not infrequent use was made of the concept of natural law. Mr. Plucknett regards the instances of such use, which he discovered in the fourteenth century, as rather loose and vague references to custom, to conscience, or to the colloquial sense of the unreasonable.² Perhaps the difference in interpretation of these legal phenomena may be due in part to the point of view of the investigator just as many American legal historians find no *bona fide* traces of natural law doctrines in the legal decisions of the American courts and others discover many illustrations of the applications of these doctrines in the opinions of the judges.

The use of the term "law of nature" was quite sparing³ and seems to have been avoided in the development of equity. More frequent applications of the term may be found in the beginnings of the law merchant.⁴

¹ *Op. cit.*, pp. 26-31, 35, 36. For a critical analysis by the same author of Coke's broad claims for the existence of a fundamental law in England, see also "Bonham's Case and Judicial Review," *Harvard Law Review*, XL (November, 1926), 30.

² *Op. cit.*, pp. 35, 36.

³ See Fortescue, *De Natura Legis Naturae* and *De Laudibus Legum Angliae*, chap. 16, and Calvin's Case, 7 Co. Rep. 121. Holdsworth finds an occasional use of the term "law of nature" in the *Yearbooks* and rather frequent references to the idea that law must accord with reason, Appendix II, Holdsworth's *History of English Law*, II, 602.

⁴ Cf. Malines, *Lex Mercatoria* (1656), p. 311, and Sir John Davis, *Concerning Impositions* (1656), chap. 3. Pollock, *Essays in the Law* (London, 1922), pp. 53 ff.

If natural law terms were not adopted in the beginning of English equity procedure, generous use of the ideas involved therein was made by the chancellors. The common lawyers of the thirteenth and early fourteenth centuries according to Holdsworth included under the term "equity"

such ideas as abstract justice and analogy. The ecclesiastical chancellors, on the other hand, based their equity on the more restricted idea that the court ought to compel each individual litigant to fulfill all the duties which reason and conscience would dictate to a person in his situation. Reason and conscience must decide how and when the injustice caused by the generality of the rules of law was to be cured. They were the executive agents in the work of applying to each individual case those dictates of the law of God and nature, upon which the ecclesiastical chancellors considered equity to rest.¹

Maitland believed that there was a more direct and insistent use of the law of nature ideas in the development of equity.²

2. *Natural Law and the Doctrine of the Supremacy of the Law.* The evolution of English ideas relating to a higher law was intimately bound up with the emerging concept of the supremacy of law. From the dominant idea of mediaeval thinkers that law should be supreme, and superior to the state itself, English judges evolved the peculiar English doctrine of the supremacy of the law, which bound even the King.³ Bracton, for instance, who made use of the Roman concept of natural law, regarded the King as subject to law but did not suggest any effective remedy for a breach of law

¹ *Op. cit.*, V, 216.

² "On the whole, my notion is that with the idea of a law of nature in their minds, they decided cases without much reference to any written authority, now making use of some analogy drawn from the common law and now some great maxim of jurisprudence which they borrowed from the canonists or the civilians." F. W. Maitland, *Equity*, p. 9.

³ Holdsworth, *op. cit.*, II, 131, 195, 196. Professor Adams speaks of "the idea that there existed a body of understood, more or less definitely formulated rights which the king was bound to observe," as a "guiding and creative principle" of the English constitution. George Burton Adams, *The Origin of the English Constitution* (New Haven, 1920), p. 157.

by the King.¹ However, the courts of law at this time were regarded as possessing certain political functions on which Professor Holdsworth comments as follows:

The law was a rule of conduct which all members of the state, rulers and subjects alike, were bound to obey, the whole conduct of government consisted in the enforcement of the law, and in the maintenance of the rights and duties to which it gave rise. It was a necessary consequence of this theory of government that the courts should possess political functions; for they existed not merely to do justice as between private persons, but also to see that the law itself was not arbitrarily infringed or altered by the king or any other person.²

The doctrine that there were superior principles of right and justice which acts of Parliament might not contravene was asserted and defended vigorously and effectively by Lord Coke in his controversy with the Stuart Kings.³ In the well-known case of Dr. Bonham, wherein the Royal College of Physicians attempted to impose a fine for illegal practice of medicine, Coke asserted that it was an established maxim of the common law that no man can be judge in his own case. And he continued: "It appears in our books that in many cases the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an

¹ *De Legibus et Consuetudinibus Angliae*, III, 9, 2, fol. 107 b and Holdsworth, II, 252, 256. Bracton copied with slight changes his account of *jus naturale* from Azo, who in his edition of the *Institutes*, follows Ulpian's classification. See Professor Maitland's Selections 8, Selden Society's *Publications* (London, 1895), p. 33. A passage of the Roman code indicated that it was the duty of the Emperor to acknowledge that he was bound by law, *Code* I, 14, 4. This idea was accepted by Azo and through him was incorporated in Bracton's *De Legibus et Consuetudinibus Angliae*, II, 16, 3. See also Carlyle, *A History of Mediaeval Political Theory in the West*, III, 34 ff., for Bracton's theory of limits on the king's authority.

² *Op. cit.*, IV, 169. The author refers to two striking examples of mediaeval courts which actually exercised political powers, namely, the Justizia of Aragon and the Parlement of Paris. "The supremacy of the law was a theme on which Coke was never tired of dilating. In fact, it would not be going too far to say that it was the view of all the leading lawyers, statesmen and publicists of the Tudor period." *Ibid.*, pp. 201, 202.

³ See Bonham's Case, 8 Co. 118a, b; Plucknett, "Bonham's Case and Judicial Review," *Harv. Law Rev.*, XL, 30; also C. G. Haines, *The American Doctrine of Judicial Supremacy* (New York, 1914), pp. 25 ff.

act of Parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void."¹ A number of cases were cited in support of this dictum.² Concerning this opinion there have been many disputes. Supporters of Coke have tried to show that the opinion with the precedents upon which it is based is an essentially accurate reflection of the situation in England at the time when the principle of the supremacy of law was winning its way over the tendencies toward the establishment of an absolute monarchy.³ On the other hand, historians have endeavored to prove that the cases on which Coke based his theory of the supremacy of the common law courts do not bear the construction which he gave to them. Most English legal authorities agree that there is no specific case on record in which an English court of justice has directly overruled or disregarded the plain meaning of an act of Parliament.⁴ In England the mediaeval

¹ 8 Co. (C.P. 1610) 114a and 2 Brownl. (C.P. 1610) 255, 265.

² Tregor's Case Y. B. Pasch, 8 Edw. III, 26; Fitzherbert, *Annuities* 41. For a thorough analysis of these cases, consult Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge, 1922), pp. 66-70 "and Bonham's Case and Judicial Review," *Harv. Law Rev.*, XL, 35 ff. Cf. also Holdsworth, *op. cit.*, V, 428, 454, 491 ff.

³ Cf. views of Sir Henry Hobart in *Day v. Savadge*, Hobart, 85 (K. B. 1614) and Lord Holt in *City of London v. Wood*, 12 Modern 669, 687 (Mayor's Court, 1701).

⁴ Pound, "Common Law and Legislation," *Harv. Law Rev.*, XXI (April, 1908), 391. "We find," says Pollock, "a series of dicta, extending to the early part of the eighteenth century, to the effect that statutes contrary to 'natural justice' or 'common right' may be treated as void. This opinion is most strongly expressed by Coke, but like many of his confident opinions, is extra-judicial. Although Coke was no canonist, we may be pretty sure that it was ultimately derived from the canonist doctrine prevailing on the continent of Europe. In England it was never a practical doctrine." *The Expansion of the Common Law*, pp. 121, 122. He claims that no case is known in fact, in which an English court of justice has openly taken on itself to overrule or disregard the plain meaning of an act of Parliament. *First Book of Jurisprudence* (3d ed., 1911), p. 264, and *Essays in the Law* (London, 1922), p. 41. This view of Pollock is confirmed by J. G. Holland, who states that "these dicta, though approved of by Lord Holt in *London v. Wood*, appear never to have been followed in practice." *The Elements of Jurisprudence* (12th ed., New York, 1917), pp. 37, 38.

Plucknett notes that this judgment needs to be slightly modified so as to account for the few instances in which courts refused to apply acts regarded as impossible to carry out or absurd in their consequences, *Harv. Law Rev.*, XL, 36 ff.

doctrine that law is above the state, which meant that there was a fundamental law which could not be changed, came to mean primarily the supremacy of law which Parliament could change at will. The dictum of Coke in *Bonham's case* that courts may refuse to enforce an act of Parliament when it is "against common right and reason," or "repugnant, or impossible to be performed," Holdsworth considers as founded on little mediaeval authority. The cases cited by Coke, he thinks, amount to little more than that the courts will interpret statutes strictly.¹ Even when the supremacy of Parliament was recognized there were few who would have admitted that Parliament possessed unlimited powers. Even Sir Francis Bacon, who took the side of the King against Coke in his assertions of common law supremacy admitted the superior force of the law of nature.² But the theoretical limits conceived as binding Parliament lost much of their significance when this body asserted its authority over the King and the courts.³

¹ Holdsworth, *op. cit.*, II, 441-443. This view is supported by F. W. Maitland, who thinks that the precedents cited by Coke do not bear him out. *The Constitutional History of England* (Cambridge, 1909), p. 301. From this slim foundation, Plucknett observes, Coke developed a theory all his own — to the effect that there was a superior body of rules which bound the King and Parliament. The subsequent results of Coke's ideas are traced in "Bonham's Case," *Harv. Law. Rev.*, XL, 49 ff. This article should be consulted for an analysis of the cases reported by Coke and those in which his views were approved.

² "Our law is grounded upon the law of nature. . . . For as the common law is more worthy than the statute law, so this law is more worthy than them both." Bacon, *Works* (ed. by Spedding, Ellis, and Heath), XV, 202 ff.

³ Holdsworth explains the merging of the supremacy of law with the concept of parliamentary supremacy, as follows:

"But when the Act of Parliament had acquired this authority, the last remnants of the idea that there might be fundamental laws, which could not be changed by any person or body of persons in the state, necessarily disappeared. It was obviously difficult to assign any limits to the power of the Acts of a body which had effected changes so sweeping as those effected by the Reformation Parliament. I do not forget that Coke sometimes writes as if he believed in the supremacy of a law which even Parliament could not change. But it would, I think, be a mistake to lay too much stress on isolated statements of this kind. In the first place, Coke was often inconsistent because he had the mind of an advocate, and therefore often allowed himself to be carried away by the argument which he was urging at the moment. In the second place, he was so thoroughly steeped in mediaeval law that

Recognizing that in the first few centuries after the establishment of Parliament there were doubts whether private acts could be passed which were judicial in character, such as bills of attainder, it was contended that in Henry VIII's reign all such doubts were removed and "the judges were obliged to admit that these acts, however morally unjust, must be obeyed."¹ Whatever effects Coke's attempt to set up a superior and fundamental law may have had, the Revolution of 1688 marked the abandonment of his doctrine as a practical principle of English politics.²

It is necessary to distinguish between the idea of an appeal to a fundamental law, when the appeal is primarily in the nature of a criticism and finds its chief sanction in the ancient right to resist arbitrary authority by revolutionary methods, and an appeal to a fundamental law which the courts must hold as binding in order to protect citizens from arbitrary authority. The appeal to a fundamental law as embodying

he sometimes reproduces ideas which he himself would have admitted to be archaic. In the third place, he is often writing and thinking of the supremacy of the existing law, and not of the question whether Parliament was competent to change it. When Parliament is not sitting it is the existing law, as interpreted by the judges, which is supreme; and when, as in the seventeenth century, the different component parts of the Parliament cannot act together, the same result ensues. In the Fourth Institute, when he is dealing specifically with the powers of Parliament, and in other passages, he admits its supremacy freely and fully.

In the sixteenth century, therefore (whatever may be true of earlier periods), it is clear that the supremacy of the law, taught by Bracton and the *Yearbooks*, has come to mean, not the supremacy of an unchangeable law, but the supremacy of a law which Parliament can change. The supremacy of the law is coming to mean the supremacy of Parliament. That the lawyers never placed any difficulty in the way of this evolution was a fact which had large effects upon the future development, both of the constitution and of the common law." *Op. cit.*, IV, 186, 187.

¹ Holdsworth, *op. cit.*, IV, 185. "It was only in England that the powers of Parliament had come to be regarded as the main security for the supremacy of the law; for it was only in England that the lawyers, by freely admitting the legislative supremacy of Parliament, had gained the support of Parliament and the nation for the mediaeval doctrine of the supremacy of law." *Ibid.*, p. 189.

² On the tendency of Coke to assume the rôle of a strenuous advocate in the causes which enlisted his interest, on his lack of consistency in relation to such matters as the supremacy of the common law, and on his uncritical use of authorities, see Holdsworth, *op. cit.*, V, 474 ff; also Plucknett, "Bonham's Case," *Harv. Law Rev.*, XL, 58, for citation of cases recognizing the supremacy of Parliament.

superior principles of right or of equity is a common method of resisting injustice and accounts in part for the extreme pretensions of Coke. It was in this connection that the assertive chief justice set about to revive interest in Magna Carta as a fundamental charter of liberties.¹ After a period of comparative neglect the Charter was rendered popular by its use as a weapon to check the extensive prerogatives claimed by James and Charles. Coke, Hampden, Eliot, and Pym gave an interpretation to long-forgotten clauses of Magna Carta that supported their partisan views of constitutional reform. The Great Charter, McKechnie observes, "as enshrined in the imaginations of the parliamentary leaders of the Puritan Rebellion was, to a great extent, the creation of Coke's legal intellect." So great was this creative effort of Coke and his followers that a contrast may well be made between two Great Charters — one, the original feudal charter; the other, the seventeenth-century charter, as it came to be accepted by the political leaders, the judges and lawyers, and the majority of the people of England.²

A middle ground between the pretensions of Coke, that both the King and Parliament were limited by a common reason and superior principles of justice of which the common law courts were the ultimate interpreters, and that of Pollock, Holland, and Holdsworth, to the effect that no cases are on record in which the will of the King and of Parliament

¹ For an analysis of Coke's ideas relating to a fundamental law, see R. A. MacKay, "Coke — Parliamentary Sovereignty or the Supremacy of the Law," *Michigan Law Review*, XXII (January, 1924), 215.

"In every government there must be Somewhat Fundamental, Somewhat like a Magna Carta, which should be standing, be unalterable. . . . That Parliament should not make themselves perpetual is a Fundamental. Of what assurance is a law to prevent so great an evil, if it lie in the same legislature to *un-law* it again? Is such a Law like to be lasting? It will be a rope of sand." Cromwell's Speech of September 12, 1654.

² W. S. McKechnie, "Magna Carta (1215-1915)" in Malden, *Magna Carta Commemoration Essays* (London, 1917), p. 12. McKechnie thinks that the inaccurate eulogies of Coke and Hampden rendered a great service to the cause of constitutional government. *Ibid.*, p. 19.

were thwarted by the courts, resting their opinion on a higher law basis, probably comes nearer to stating the actual situation in England. Even if it be true, as is claimed, that there is no case on record in which the clearly expressed will of the King and of Parliament were really checked by the courts there were instances in which the courts, interpreting the common law changed the meaning of statutes, refused to give them the effect intended, or to apply a rule of his majesty in council until the King, Lords, and Commons joined in an unmistakable mandate, which the courts reluctantly at times conceded it was their duty to obey. Short of such mandates clearly and unequivocally expressed there was a wide realm in which the courts applied the basic principles of reason of the common law and were seldom interfered with either by the King or by Parliament.¹ Moreover, the frequent confirmations or reaffirmations of Magna Carta served to impress upon the public mind that enshrined therein were fundamental principles upon which the superstructure of the English constitution might arise. Coke's reiteration of these principles served to strengthen the basic doctrine of the supremacy of the law.

It was Coke's version of the supremacy of the common law, as an exemplification of rules of reason and of justice, which the courts must enforce even above the King and Parliament, that served as a convenient argument when American justices were confronted with the demand that limits must be placed on legislative powers to safeguard individual rights and privileges.²

Blackstone in his *Commentaries* gave a version of natural law which, through the popularity of his work, was given wide currency. "Man, considered as a creature," he said,

¹ Plucknett, *Statutes and their Interpretation in the Fourteenth Century*, Part II.

² Cf. *The American Doctrine of Judicial Supremacy*, chap. 2 and Plucknett, "Bonham's Case and Judicial Review," *Harv. Law Rev.*, XL, 61 ff.

must necessarily be subject to the laws of his Creator. . . . This will of his maker is called the law of nature. . . . This law of nature, being co-eval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times; no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force and all their authority, mediately and immediately, from this original. . . . Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say no human laws should be suffered to contradict these . . . nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else we offend both the natural and the divine.¹

He placed these precepts in the realm of moral restraints by later admitting that no authority could prevent Parliament from enacting laws contrary to them. With the supremacy of Parliament generally accepted the references to superior natural laws become less frequent.

3. *Evidences of Natural Law Ideas in Judicial Decisions.* The efforts to predicate a basis for a fundamental law, which were gradually brushed aside as Parliament gained ascendancy over the other departments of government, are by no means the only attempts to apply the ancient and mediaeval concepts of natural law in England. Sir Frederick Pollock has indicated the inaccuracy of the prevailing view that English law was comparatively free from the influence of natural law doctrines.² When Roman and canon law doctrines came into dispute in England Pollock observes that

¹ I, 41-43. See also, Hooker, *The Laws of Ecclesiastical Polity*, Book III, chap. 9.

² "The History of the Law of Nature," *Journal of Society of Comparative Legislation*, II (1900), 418, and *Columbia Law Review*, I (Jan., 1901), 11. Cf. also Pollock, *The Expansion of the Common Law* (London, 1904), pp. 107-138. "The term 'law of nature,' or natural law, has been in use in various applications ever since the time of the later Roman Republic. Their variety and apparent diversity have tended to obscure the central idea which underlies them all, that of an ultimate principle of fitness with regard to the nature of man as a rational and social being, which is, or ought to be the justification of every form of positive law. Such a principle, under the name of reason, reasonableness, or sometimes natural justice, is fully recognized in our own system, but the difference in terminology has tended to conceal the similarity from English lawyers during the last century or more." Pollock, "The History of the Law of Nature," *Col. Law Rev.*, p. 11.

the law of nature terminology was frowned upon and gradually dropped, only, to be restored in common law terminology in the words "reason" and "reasonable." Due to a natural aversion to Continental ideals and to the influences of church law and of Roman law it became the English practice to speak of reason in preference to the mediaeval concept of the law of nature.¹ Natural justice or reason which the common law recognizes and applies does not differ from the law of nature which the Romans identified with *jus gentium* and the mediaeval jurists accepted as being divine law revealed chiefly through man's natural reason.²

Pollock's summary of the extensive ramifications of the doctrine of reasonableness or the English version of natural law deserves to be quoted:

Reasonable price and reasonable time are among the most familiar elements in our law of contract. Oftentimes no more definite instruction can be given to a jury than to award reasonable damages. "Natural reason and the just construction of the law," as Blackstone said, have given us the various applications of the common counts, extending to the whole field of what we now call quasi-contract. In Lord Mansfield's hands the principles of natural equity were an enchanter's wand to call a whole new world of justice into being. The test of what a reasonable man's conduct would be in the circumstances governs our modern law of negligence and underlies those branches of it which have been specialized into groups of definite rules. Almost in our own time a simple and wholly untechnical conception of the same kind has been developed into the doctrine of estoppel "in pais," perhaps the most powerful and flexible instrument to be found in any system of civil jurisprudence.³

¹ Christopher St. Germain, *Doctor and Student*, Dial., 1. chap. 5. St. Germain aimed to popularize the canonist conception of equity and to define its relations to the common law, and he exercised a great influence on the development of modern English equity. Holdsworth, *op. cit.*, V, 266 ff.

² "The Common Law is pictured invested with a halo of dignity, peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man," Figgis, *The Divine Right of Kings*, pp. 228, 229. "Common Law is the perfect ideal law; for it is natural reason developed and expounded by the collective wisdom of many generations." *Ibid.*, p. 229.

³ *The Expansion of the Common Law*, p. 108, also Pollock, *Essays in the Law*, pp. 63, 68, 69.

Since the Middle Ages the law of nature or its offshoot, the law of reason, has been an important factor in the development of equity, of the law merchant, and of the law of nations.¹ Principles of natural justice are also recognized and applied today in cases where the courts review the exercise of quasi-judicial powers by administrative boards, committees, or commissions.²

One need not seek far in English case law to find impressive examples of the use of the doctrine of reason or reasonableness, though the law of nature connotations of these phrases may be inadvertently or purposely concealed.³

¹ *The Expansion of the Common Law*, pp. 108-113. Pollock speaks of this law of nature or law of reason as a "pervading ideal, of which it would be hardly too much to say that it is the life of the modern Common Law," *ibid.*, p. 109.

² Pollock, *Essays in the Law*, p. 70. See *Local Government Board v. Arlidge* (1913) 1 K. B. 463; (1914) 1 K. B. 160; (1915) A. C. 120. In the *Arlidge* Case administrative proceedings which did not accord the injured party a hearing or an opportunity to see the record on which the decision of the officers had been rendered were held valid. The first trial in the Court of King's Bench resulted in the approval of the administrative action. The failure to grant a hearing or to permit an examination of the records, the Court of Appeal held to be contrary to the principles of natural justice on which the English common law is based. See especially, opinion of J. Vaughn Williams, *Rex v. Local Government Board* (1914) 1 K. B. 160, 176. By the House of Lords this decision was reversed on the ground that the acts of Parliament expressly authorized such administrative proceedings and did not provide in these instances for review by the courts. Lord Shaw disapproved of the ground on which the Court of Appeal based its judgment. He observed: "In so far as the term 'natural justice' means that a result or process should be just, it is harmless though it may be a high-sounding expression; in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and, in so far as it is resorted to for other purposes, it is vacuous." *Local Government Board v. Arlidge* (1915) A. C. 120, 138. Lord Moulton also objected to the use of the phrase "contrary to natural justice" in this connection, *ibid.*, 150. Cf. also Sir Paul Vinogradoff, *Yale Law Journal*, XXXIV, 68, and decisions and remarks in the cases of *Scott v. Scott* (1913) C. 417, 176 (an action for the nullity of a marriage in which proceedings were conducted in camera) and of *Chester v. Bateson* (1920) 1 K. B. 829 (interference with rights of citizens through ministerial orders under the Defence of the Realm Act).

³ Cf. Pollock, *The Expansion of the Common Law*, pp. 123 ff. A few applications of law of nature concepts may be cited: Certain decisions relating to the validity of the procedure of foreign courts when judgments had been rendered without notice or through fraud made use of the phrase "contrary to natural justice." For example, Lord Ellenborough said: "It is contrary to the first principles of reason and justice that either in civil or criminal proceedings, a man should be condemned before he is heard." *Buchanan v. Rucker* (1807) 1 Camp. 63, 66. For a criticism of this language of Ellenborough as no more than declamation, see J. Blackburn in *Schibsby v. Westenholz* (1870) L. R. 6 Q. B. 155, 160.

The law of nature as "the living embodiment of the collective reason of mankind" has, indeed, been adopted by the

Bramwell B. "If this were the case of a judgment obtained by reason of untrue statements contained in an affidavit in a foreign court where the procedure is contrary to natural justice, then we might refuse to give effect to that judgment. . . . If the proceedings be in accordance with the practice of the foreign court, but that practice is not in accordance with natural justice, this court will not allow itself to be concluded by them." In *Crawley v. Isaacs* (1867) 16 L. T. R. 529, 531.

Mellish, L. J. "It was always held that a foreign judgment could be impeached at law as contrary to the principles of natural justice, as, for instance, on the ground of the defendant having had no notice of the foreign action, or not having been summoned or of want of jurisdiction, or that the judgment was fraudulently obtained." In *Ochsenbein v. Papelier* (1873) L. R. 8 Ch. 695, 700.

"Our common-law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise." Justice James Parke in *Mirehouse v. Rennell* (1833) 1 Cl. & F. 527, 546.

A modern illustration of the application of the old doctrine of natural rights is made by Justice Farwell when in giving judgment on certain rights involved in underground water courses he remarks: "The foundation of the right as stated throughout all the cases is *jus naturae* [citations to a number of cases follow]. . . . I have come to the conclusion, therefore, that *jus naturae* is used in these cases as expressing that principle in English law which is akin to, if not derived from, the *jus naturale* of Roman law. English law is, of course, quite independent of Roman law, but the conception of *aequum et bonum* and the rights flowing therefrom which are included in the *jus naturale* underlie a great part of English common law; although it is not usual to find 'the law of nature' or 'natural law' referred to in so many words in English cases." *Bradford Corporation v. Ferrand* (1902) 2 Ch. 655, 661, 662. Cf. Lord Mansfield's reference to obligations of justice and equity in *Moses v. Macferlen* (1760) 2 Burr. 1005, 1012 and opinions of Baron Martin in *Freeman v. Jeffries* (1869) L. R. 4 Ex. 189, 199 and Justice Buller in *Master v. Miller* (1791) 4 T. R. 320, 342.

Justice Parker, referring to the custom that a mortgage on the real estate of a married woman might be executed by her husband without having been acknowledged by her, said "It is quite clear that for a custom to be good it must be reasonable or, at any rate, not unreasonable. The words 'reasonable or not reasonable' imply an appeal to some criterion higher than the mere rules or maxims embodied in the common law, for it is no objection to a custom that it is not in accordance with these rules or maxims. . . . A custom to be valid must be such that, in the opinion of a trained lawyer, it is consistent or, at any rate, not inconsistent, with those general principles which, quite apart from particular rule or maxims, lie at the root of our legal system. . . . 'Custom,' as it is put in *Needler v. Bishop of Winchester* (Hob. 220, 225) 'must not deprive the law of nature.' Lawyers of today do not refer to the law of nature as freely or confidently as lawyers did centuries ago, but, translated into modern phraseology, I think this means that a custom . . . must be according to the principles of our common law." *Johnson v. Clark* (1908) 1 Ch. 303, 311, 312.

common law in substance if not in express terms.¹ Despite the persistent applications of natural law concepts in English law certain English jurists frequently refer to the philosophy of law as comprehended under *Naturrecht* as a German product, and criticize such thinking as "a mere system of elaborate trifling."²

4. *Types of Natural Law Theories applied in English Law.* It is apparent that natural law concepts of one kind or another served various purposes in English legal history. First, there was in mediaeval times an identification of the term "natural" with the "customary" rules of the common law. The importance attached to these natural or customary rules, the origins of which were unknown, gave an element of certainty and permanence to the emerging system of the common law, and encouraged the belief that certain laws were fundamental. As the courts were the prime agencies in the application of these rules it encouraged the recognition of the supremacy of the law as interpreted by the justices.

Second, the doctrine of the supremacy of the law was given a prominent place in the conflict between the King and the barons when resistance to the King was supported by reference to the fundamental immemorial rights of Englishmen — essentially a form of appeal to a higher law. The assertion of the idea that there was a law above the King and above Parliament as that body gained in prominence, despite the differences of opinion regarding its significance, became a vital principle in the growth of English constitutionalism. It encouraged a more definite recognition of

¹ In British India the law of nature has been used as a device to aid in the introduction of English legal ideas. The judges are instructed in various Indian provinces to act "according to justice, equity and good conscience." Pollock, *Essays in the Law*, p. 70 and *Expansion of the Common Law*, pp. 132 ff.

² W. G. Miller, *The Law of Nature and Nations in Scotland* (Edinburgh, 1896), p. 5.

the distinction between ordinary law and fundamental law. As a means of supporting the revolt against arbitrary rulers the concepts of natural law and natural justice were revolutionary and idealistic.

Third, the theory that law is of divine origin and that such rules as accord with this law are natural and valid was inherited from Continental European thought and was accepted by some English lawyers and jurists until the bonds with the Roman church and the mediaeval canonists were severed. As in Blackstone's *Commentaries*, the theory may be repeated at times with little reference to its practical importance in English law.

Fourth, law of nature ideas were the sources from which the common law judges derived their notions of rules of reason and natural justice whereby they aimed to rationalize the legal processes. In this rôle these ideas became active and progressive principles of legal growth. They assisted in establishing close relations between legal logic and practical experience. The growth of the common law in an inductive, experimental, and pragmatic manner was conditioned by the famous rule of reason, which prevented the rigid and archaic procedure and rules of the system from remaining long in force when they were not in accord with social and economic conditions. The manifold appearances of the rule of reason in Anglo-American law bear witness to the fact that natural law doctrines are not ignored or discarded in the jurisdictions which are subject to this law. But differences in terminology have tended to obscure the continuous applications in English law of natural law concepts which play an important rôle in Continental legal systems.

5. *Differences between the Anglo-American and the Continental Legal Points of View.* The fact that in Continental systems of law two words are in use for the ideas comprehended in the English word "law" differentiates certain

phases of legal thought of Continental nations in contrast with that of Anglo-American countries. Two sets of words to express two ideas of law are:

Latin	jus	lex
German	Recht ¹	Gesetz
French	droit	loi
Italian	diritto	legge
Spanish	derecho	ley

Though the two terms are not always clearly distinguished, *lex* is the term which commonly designates written enactments or rules and *jus* ² refers to those rules which are just or inherently right or equitable. To the Romans *jus naturale* comprised the eternal principles of justice, as understood and appreciated by the human reason; but in the Middle Ages, as we have seen, the *jus naturale* frequently became the *lex naturalis*, or positive enactments proceeding from God, which were considered superior to all human laws.

When law was based largely on custom and on the application of traditional rules, and legislation was comparatively rare, the *lex* or *loi* was regarded as the embodiment of reason, for customs and traditions to be valid were expected to be reasonable. Later the distinction between *droit* and *loi* was more clearly drawn. In modern terminology *la loi* is a declaration of the will of the sovereign upon an object of com-

¹ The German Recht is never quite our "right" or quite our "law" says Maitland in his introduction to *Political Theories of the Middle Ages* by Otto Gierke, p. lxiii. Closely related to the German Recht is what is called by Ihering the *Sittlichkeit*, "the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which it is 'bad form' or 'not the thing' to disregard." See Lord Haldane, "Higher Nationality: A Study in Law and Ethics," American Bar Association *Reports*, XXXVIII (1913), 393. Though there is no word in English which exactly expresses the meaning of *Sittlichkeit*, it is sometimes translated as "social ethics."

² "There is nothing in the Greek language exactly corresponding to the Latin *jus*. The Roman term cannot be translated by νόμος, which is mainly used for statutory law — *lex*. Nor is τὸ δίκαιον an equivalent, for it signifies "the just." . . . These phraseological peculiarities point to the highly important fact that the Greeks regarded law primarily as the embodiment of justice." Vinogradoff, *Jurisprudence of the Greek City*, p. 19.

mon interest,¹ and *droit* is the aggregate of precepts or laws (*lois*) governing the conduct of man toward his fellows, the observance of which it is possible, and at the same time useful, to assure by way of external coercion. Thus with a term to characterize the enactments, usually in writing, to which men are expected to conform and the rules or ideas of justice which are to guide and control civil conduct, it is possible to differentiate between the ordinary conventional laws of a time and place and the underlying rules and principles which form the very groundwork of the legal structure. The terms *droit* or *Recht*,² combining the ideas of a rule of civil conduct and a principle of justice, necessarily mingle law and morals in juridical speculation, whereas with a single term—law—English jurists have been inclined to divorce law and ethics.

"To this difference of language, and to the consequent difference in the tone of juridical speculation," Mr. Salmond thinks,

we may attribute, more than to any other single cause, the acceptance on the Continent and the rejection in England of that which the French call *droit naturel*, and the Germans *Naturrecht*.³ It follows that our language can supply no equivalent for these terms, for they combine ethical and juridical significations in a manner not permitted to English speech. To express the ethical meaning we must use the terms *natural right* or *natural justice*; while the juridical meaning is

¹ Laurent, *Principes du droit civil français*, vol. I, sec. 2, also Baudry-Lacantinerie, *Précis de droit civil*, vol. I, sec. 1.

² "Recht is 'right and law' — the law looked at not merely as courts enforce it, but also with reference to what the courts are seeking to attain through the judicial administration of justice." Pound, *Law and Morals*, pp. 84, 85.

³ It may be observed that the German terms *Recht* and *Naturrecht* include only a portion of good conduct, the remainder being covered by *Tugend*, *Sittlichkeit*, and *Moralität*. In France, *droit* and *droit naturel* are opposed to *moralité*.

Sir Frederick Pollock speaks of the Continental schools of jurisprudence as either ethical or historical. "By the ethical school I mean . . . those authors who throw their main strength on investigating the universal moral and social conditions of government and laws, and expounding what such government and laws are or ought to be, so far as determined by conformity to those conditions. This is the nearest account I can give in few words of what is implied in modern usage by the terms law of nature, *droit naturel* or *Naturrecht*." *An Introduction to the History of the Science of Politics*, p. 110.

expressed by the terms *natural law* or the *law of nature*. For a full equivalent for the French and German expressions, we may resort to the corresponding Latin *jus naturale*, which possesses the same two-fold meaning, being either *justitia naturalis* or *lex naturae*.¹

The differences in terminology and points of view are likely to be exaggerated, for whether or not separate words be used for definite written enactments and for rules of right or principles of justice the results in legal thinking do not vary greatly on this account. The fact that writers in Europe give a great deal more attention to legal speculations and that the schools of *droit naturel* or *Naturrecht* have produced elaborate and influential treatises is due rather to a different approach to philosophy and to speculative thought than to variations in terms. The Englishman's effort to divorce morals and law is, of course, not successful and his vain attempts to repudiate natural law thinking have failed to conceal the substratum of rationalizing in accordance with well-known natural law connotations. The obvious methods of suppression of natural law concepts are but a reflex of a type of mind which depreciates rationalizing and philosophizing at the same time that new ideas and new institutions are being molded in accordance with the assumptions and preconceived notions of particular schools of philosophic thought.² Englishmen are less prone to formulate the speculative ideas which are the warp and woof of their social fabric and they have been masters in the application of theories which, however, have been thought to be more acceptable because they were believed to be concealed.³

¹ "The Law of Nature," *Law Quar. Rev.*, XI (April, 1926), 121.

² "English lawyers are not, and never have been ready," says Professor Holdsworth, "to receive and use as the basis of their reasoning the theories of legal and political philosophers." *Some Lessons from our Legal History* (New York, 1928), p. 109.

³ Generalizations, often assumed and followed without any definite formulation, are likely to form the major premises of judicial reasoning. For some interesting examples of this type, cf. H. Rottschaefer, "Legal Theory and the Practice of the

It was in the United States and in France, however, that different types of natural law concepts were to take shape. Higher law ideas were soon to become in these countries the source and sanction for portions of private and public law.

Law," *Minnesota Law Review*, X (April, 1926), 382. Mr. Rottschaefer notes that not only are such generalizations subsumed in much judicial thinking but similar generalizations serve as a background for those who criticize legal rules.

CHAPTER III

AMERICAN AND FRENCH NATURAL LAW DOCTRINES

BY THE time political theories and customs were taking definite shape in the American Colonies the characteristic ideas relating to natural law in England and in Continental Europe had been introduced into the environment of a pioneer rural civilization. But before the transmission took place a change in emphasis was under way which was accentuated under the peculiar conditions prevailing in America.

1. *Transition from Natural Law Doctrines to Theories of Natural Rights.* When the standard works of Gentilis, Grotius, Pufendorf, and Burlamaqui aimed to present the basic principles of the public and private law of Europe natural law doctrines were generally approved. As the importance of the canon law declined the doctrines were limited in their applications and, in certain countries, except for their use as critical standards to oppose the arbitrary and dictatorial policies of princes and kings, they were sparingly used in the practical operation of the law. But all branches of the law were subjected to natural law influences.

The original concepts of natural law, however, were to undergo a marked transformation, when the Reformation leaders, following Roman and mediaeval authorities, gave great significance in political and religious matters to the rights and liberties of the individual. Instead of natural law or rules of superior validity *jus naturale* was translated into a theory of natural rights — qualities inherent in man which it was the duty of the state to protect. Grotius was one of the foremost mediaeval thinkers to find a source of natural

rights in certain inherent qualities belonging to the individual. These rights, which were sanctioned by natural law, might be discovered by human reason.¹ Montesquieu and the Physiocrats in France and English philosophers also formulated theories of natural rights as inherent in the individual, with certain formulas derived therefrom designed to limit all public authorities.² Moreover, the distinction suggested several centuries earlier that rulers were bound not only by the primary laws of nature but also by certain fundamental secondary natural laws which were expressed in positive laws, was formally enunciated.³

One of the popular writers of the eighteenth century, who based his political philosophy on rights inherent in the individual, was Vattel, whose volume on *The Law of Nations* appeared in many editions, French, English, and German.⁴ As a representative authority Vattel's views, as well as those of Grotius, Pufendorf, and Burlamaqui, were extensively studied and followed during the formative period of American law. Vattel, who was a follower of Frederic von Wolff, began to translate Wolff's work, *Jus Naturae Methodo Scientifica Pertractatum*, and to render it available to the public and the result was that he put the doctrines of Wolff into such form that a relatively new and popular treatise was prepared.

To Vattel, it was regarded as settled on the basis of natural

¹ See *De Jure Belli ac Pacis*, Book I, chap. 1.

² Recognizing that the formulation and classification of the inborn and in destructible rights of the individual belonged to a later stage in the growth of the theory of natural law, Gierke observed that mediaeval thought was filled with such ideas. *Political Theories of the Middle Ages*, p. 81; cf. also, Gierke, *Johannes Althusius*, pp. 107 ff. It is obvious that to attribute the origin of the theory of natural rights to the Protestant revolt is incorrect. Cf. David G. Ritchie, *Natural Rights: A criticism of some political and ethical conceptions* (3d ed., London, 1916), p. 6.

³ Gierke, *Johannes Althusius*, p. 175. For the effort to distinguish between immutable laws which do or do not admit of exceptions, see Domat, *The Civil Law in its Natural Order*, trans. by Wm. Strahan (2d ed., London, 1737), I, 64.

⁴ M. de Vattel, *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains* (ed. of 1758) reproduced in the *Classics of International Law*, edited by James Brown Scott and published by the Carnegie Institution of Washington (1916).

law "that liberty and independence belong to man by his very nature, and that they cannot be taken from him without his consent." Moreover, "the whole Nation, whose common will is but the outcome of the united wills of the citizens, remains subject to the laws of nature, and is bound to respect them in all its undertakings. . . . We must therefore," he continued, "apply to nations the rules of the natural law to discover what are their obligations and their rights; hence, the *law of Nations* is in its origin merely the *law of Nature applied to Nations*."

Vattel regarded this law immutable as being founded "on the nature of things," and particularly "on the nature of man" and hence he thought, "nations can not alter it by agreement, nor individually or mutually release themselves from it."¹ Vattel aided in the movement to establish written constitutions, as the foundation of public authority. He maintained that the fundamental laws enacted by the nation itself are not subject to change by the legislature. The distinction between fundamental and ordinary law was clearly drawn,² and American legal authorities soon began to make practical applications of the distinction.

With the writings of Grotius, Pufendorf, Wolff, and Vattel attention was directed to a state of nature — a golden age which existed at the beginning of society in which the laws of nature, as affecting the relations of individuals and of communities, predominated.³ These laws of nature were of

¹ Vattel, *The Law of Nations*, III, 3, 4. Professor Reeves thinks that the "impress of the law of nature upon the American ideas of the law of nations seems upon the whole not to be great." His view is apparently influenced by the tendency of American lawyers to depreciate natural law ideas. J. S. Reeves, "The Influence of the Law of Nature upon International Law in the United States," *American Journal of International Law*, III (1909), 547.

² *The Law of Nations*, III, chap. 3.

³ Cf. Introduction by Albert de Lapradelle, in Vattel, *op. cit.*, III, viii. John Milton claimed, in the *Gangreana*, that "all men are by nature the sons of Adam, and from him have legitimately derived natural propriety [property], right and freedom. By natural birth all men are equally and alike born to like propriety, liberty and freedom."

the immutable type, and it was not long before jurists and politicians began to think of man as emerging from this state of nature with a panoply of rights belonging to him as an individual. Political and economic conditions in Europe and in America were taking the shape which gave vital and legal force to the emerging concept of the natural inherent and inalienable rights of man.¹

2. *American Theories of Natural Law and of Inalienable Rights.* In the process of transplanting fundamental law notions to the American Colonies, conditions were favorable not only to the reception of higher law theories but also to their incorporation as basic doctrines of public and private law. The colonists brought with them many of the current ideas of the common law as the foundation of their legal arrangements. But the law was as a rule applied by those untrained in the technical procedure and rules of the English system. Statutes applicable to local conditions were frequently lacking. Courts and judges found themselves called upon to make law for the occasion with little else to guide them except the Bible, the precepts of natural law or natural justice, and the community sentiment of what ought to be right and just. Under such circumstances appeals were frequently made to natural law or to allied concepts.

The pioneer rural conditions in which most of the colonists lived encouraged self-reliance not only in their economic and social conditions but also in their political ideas. Dependent for the most part upon their own efforts for a livelihood, they also had to assume a large share of responsibility in protecting individual and community rights. With the organized evidences of government far removed from the ordinary activities of life it was customary to place a high value on

¹ One reason why Englishmen have given less consideration to natural rights, it is claimed, is that they have regarded their liberties as due to acquired rights rather than to natural rights. To them the concept "natural" became identical with the term "traditional." Jones, *Cambridge Legal Essays* (Cambridge, 1926), p. 228.

the assertion and protection of individual personal rights. Moreover, the normal methods of making and enforcing law tended to give special value to doctrines of natural law. Under the primitive conditions which prevailed, natural rights and natural law were regarded either as identical or as merely two phases of the same concept. Having theoretically, at least, adopted the rules and principles of the common law the prevailing English views as to the supremacy of the law were accepted. And the higher law doctrine as later announced by Blackstone gave sanction to the belief that certain laws were superior to all civil enactments.¹ The judges in the Colonies frequently indicated their belief in the natural laws, which were considered true laws, and legislation was thought to be binding only in so far as it was an expression of these laws.²

The process of the transmission of natural law theories to the new environment was hastened by the appeal to higher law ideas by the leaders of the revolt against Great Britain and by the philosophic trend of the eighteenth century to place uppermost in the political sphere the natural rights of the individual.³

¹ According to the classical natural law theory prevalent in colonial times all positive law was "a reflection of an ideal body of perfect rules demonstrable by reason, and valid for all times, all places and all men. Positive legal precepts got their validity from their conformity to these ideals." Pound, "The Theory of Judicial Decision," *Harvard Law Review*, XXXVI (May, 1923), 802.

² P. S. Reinsch, "Colonial Common Law," *Select Essays in Anglo-American Legal History*, I, 376, 413; Professor Reinsch observes that "the analytical theory of Hobbes, making positive law independent of moral considerations and basing it on a sovereign will, was not accepted at that time. The law of God, the law of nature, was looked upon as the true law." For citations of representative colonial opinions see B. F. Wright, Jr., "Natural Law in American Political Theory," *South-western Political and Social Science Quarterly*, IV (December, 1923), 202, 206. Cf. for example, John Wise, "A Vindication of the Government of New England Churches" — a pre-revolutionary treatise based on the natural law doctrines of Pufendorf.

³ Professor McIlwain maintains that the colonists based their argument for freedom from control by Parliament, first on their charters; second, on the contention "that the English constitution, founded on natural law, was a free constitution, guaranteeing to all its subjects wherever they might be the fundamental rights incident to free government"; and third, on a "non-constitutional appeal to natural

The popularity of the concepts of natural rights and of natural law was greatly increased when they were espoused by the leaders of the American and French Revolutions. The American Revolution not only came first but also resulted in a more specific formulation of natural rights as inherent in the individual. James Otis, Samuel Adams, John Adams,¹ Thomas Paine, Patrick Henry, and Thomas Jefferson² made frequent use of the natural rights doctrine to support the right of rebellion against the arbitrary exercise of governmental powers. The Declaration of Independence gave a standard formula for the use of advocates of the doctrine in the dictum that men are "endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." Many of the Revolutionary patriots believed with Thomas Dickinson that

law, no longer as a part of the British constitution, but as the rights of man in general." *The American Revolution. A constitutional interpretation* (New York, 1923), p. 152.

¹ John Adams thought there were "rights antecedent to all earthly government — Rights, that cannot be repealed or restrained by human laws — Rights, derived from the great Legislator of the Universe." *Works*, ed. by C. F. Adams (Boston, 1865), III, 449. See also Otis, *The Rights of the British Colonies Asserted and Proved*, pp. 11, 16.; Wells, *Life of Samuel Adams* (Boston, 1865), I, 16-23, 70-77; and Thomas Paine, *The Rights of Man*.

² For Jefferson's views, see *Writings* (Ford's ed.), V, 147, 329; VI, 87, 88, 102, 517; VII, 172, 406.

It was asserted that colonial rights were based on "the immutable laws of nature, the principles of the English Constitution and the several charters or compacts." *Journals of the Continental Congress*, ed. by Ford (Washington, 1904), I, 67.

James Otis in his argument against writs of assistance relied on natural rights and fundamental law. Cf. *The Rights of the British Colonies*; also C. H. McIlwain, *op. cit.*, and my article "The Law of Nature in State and Federal Judicial Decisions," *Yale Law Journal*, XXV (June, 1916), 617, 623.

Jefferson in the Declaration of Independence in qualifying the inalienable rights used the English formula "life, liberty and the pursuit of happiness." The Virginia constitution asserted that: "All men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Constitution of Virginia, June 12, 1776.

The right to revolt was characterized in the Massachusetts declaration as "incontestable, unalienable and undefeasible."

liberties do not result from charters; charters rather are in the nature of declarations of pre-existing rights. They are founded, John Adams claimed, "in the frame of human nature, rooted in the constitution of the intellectual and moral world."¹ Until the adoption of the Declaration of Independence it was customary to regard these rights as having their sanction in the British Constitution.² "The law of nature and the law of revelation are both divine; they flow, though in different channels from the same adorable source," said James Wilson. In the course of his law *Lectures* he frequently extolled the instinctive or intuitive faculties whereby man arrived at principles of right and justice.³

The doctrine of the freedom and equality of men in their natural state, such as that described by Seneca and formulated into a dogma of mediaeval thought, was translated into a principle of political action. Governments, to justify their existence, were to be measured by the security they furnished for the natural principles of freedom and of equality.

Concepts of law in North America in the eighteenth and in the early nineteenth centuries were molded and, in considerable part, determined under the influence of the prevailing doctrine of inalienable rights and this idea gave a peculiar turn to all legal thinking. The law of the Colonies, the public papers and charters of the Revolutionary period, and the first written constitutions with specific enumeration

¹ See B. F. Wright, Jr., "American Interpretations of Natural Law," *American Political Science Review*, XX (Aug. 1926), 524 ff.

² Samuel Adams, *Writings* (ed. by H. A. Cushing, 1904), I, 65. "The primary, absolute, natural rights of Englishmen as frequently declared in acts of Parliament from Magna Carta to this day, are personal security, personal liberty, and private property." Wells, *Life of Samuel Adams*, I, 75-77.

³ *Works* (ed. by Andrews), I, 106, 117, 124. Wilson expressed the current opinion among lawyers and judges during the Revolutionary period when he wrote: "The law of nature is immutable; not by the effect of an arbitrary disposition, but because it has its foundation in the nature, constitution, and mutual relations of men and things."

of certain natural and inalienable rights, bear witness to the conviction that such rights were thought to exist, and that governments were designed primarily to preserve them.¹ Legislative enactments contrary to natural law or natural justice were regarded as *ipso facto* void and it was declared to be the duty of all persons to resist their enforcement. The view of the English philosopher that "that which is not just is not law and that which is not law ought not to be obeyed,"² was not infrequently taken as the starting point in the application of legal rules. Moreover, the belief in natural law and in inalienable rights aided materially in giving support to the courts when they were asserting the right to declare void enactments which interfered with these natural rights or contravened the express terms of written constitutions.³

The natural law philosophy, as a background for legal thinking, which was a part of the heritage of Western Europe and of America in the eighteenth century, was extensively used in America, where it was transformed into *laissez faire* individualistic dogmas under frontier methods of administering justice. It was also identified with the immemorial rights of Englishmen as declared by Coke and Blackstone. Into the philosophical mold of Grotius, Pufendorf, Burlamaqui, and Vattel was injected some of the characteristic ideas

¹ Jefferson believed that the "will of the majority is in all cases to prevail, but that will to be rightful, must be reasonable; that the minority possess equal rights, which equal laws must protect, and to violate would be oppression." Legitimate restraints on the rule of the majority were inalienable rights and the laws of reason. *Works*, VIII, 2. When Secretary of State and President, Jefferson continued to apply doctrines of natural right and natural law. "The evidence of this natural right [expatriation], like that of our right to life, liberty, the use of our faculties, the pursuit of happiness, is not left to the feeble and sophisticated investigations of reason but is impressed on the sense of every man." *The Writings of Thomas Jefferson* (ed. by H. A. Washington), VII, 73. He also defended the right of navigation on the Mississippi on the broad ground of the law of nature and of nations.

² Sydney, *Discourses Concerning Government*, Book III, chap. 11.

See also, Pound, "Comparative Law in the Formation of American Common Law," *Acta Academiae Universalis Jurisprudentiae Comparativae* (1928), I, 183 ff.

³ *The American Doctrine of Judicial Supremacy*, pp. 18 ff., and D. O. Wagner, "Some Antecedents of the American Doctrine of Judicial Review," *Political Science Quarterly*, XL (December, 1925), 561 ff.

of Coke's *Second Institute* and of Blackstone's *Commentaries* and there was created a unique form of natural law, supposed to be universal in its applications.¹

American political and legal theorists made use of every phase of natural law thinking. Judges with little legal training and with a scarcity of law books, when precepts from the Bible were not applicable, turned to natural law as a convenient symbol for the divine sanction of laws, after the fashion of the mediaeval canonists. To Paine and Jefferson, as with certain Greek thinkers, there was a disposition to recur to the deistic emphasis upon the laws of nature and to associate the concept with underlying principles of natural phenomena. Others identified the rights of nature with the rights of Englishmen. Though not so well known, Coke's appeal to natural law and to the higher reason of the common law was called upon by legal advocates when attacking obnoxious acts of the colonial legislatures, just as higher laws were appealed to in resisting the arbitrary acts of the King or of Parliament. The appeal to natural rights and natural law as a justification for the right of revolution was one of the chief features of the formative period of American institutions.

Natural law was also conceived as an ideal to which all just laws must conform,² as from the viewpoint of certain

¹ Pound, "The Theory of Judicial Decision," *Har. Law Rev.*, XXXVI, pp. 804, 805. Hamilton identified the common law and natural law. *Works* (ed. by Lodge), VIII, 421.

In the disputes between the English political leaders and the colonists of America, Dr. Wright notes that those "who had read the orations of Cicero, the writings of Grotius and Vattel, Pufendorf and Burlamaqui, Locke and Blackstone, who had listened to sermons upon the eternal supremacy of the laws of God or had perused the arguments of the deists found in such philosophy controversial weapons suited to their needs." See, "American Interpretations of Natural Law," *Amer. Pol. Sci. Rev.*, XX, 526. And he observes, "In the writings of all of the most influential theorists of the time the concept of a superior law of nature, from which are derived the basic rights of men, holds a very prominent place."

² Natural rights and natural law, as an ideal form of the actual law were in the seventeenth and eighteenth centuries "guides to lead growth into definite channels and insure continuity and permanence in the development of rules and doctrines." Pound, *An Introduction to the Philosophy of Law* (New Haven, 1922), p. 44.

Greek and Roman jurists, and, in this sense, it was a convenient doctrine to temper the arbitrary features of a system of strict legal rules. It thus became an instrument of legal growth. Conceptions of a state of nature wherein men enjoyed natural freedom and equality conditioned the thinking of most of the Revolutionary leaders and through them a principle was announced which has proved to be one of the most insistent and fertile concepts of American legal thought, namely, that each individual is entitled to the equal protection of the laws.

Assuming a state of nature antedating organized political life wherein man was possessed of inherent and inalienable rights arising from the laws of nature, and basing government on a social compact resulting from this condition, there was formulated in the representative American constitution a group of rights belonging to the individual and of such superior sanctity that political society was formed primarily to preserve them. Out of a state of nature and emanating from the laws of nature arose the familiar inalienable rights which were superior to the state itself and, in fact, above all forms of political or social control. The theory of natural rights, which is the characteristic American interpretation of natural law, became the foundation for the concept of limited government which gained such a strong foothold in the United States. It gave the theoretical basis for the American doctrine of civil liberty which set the rights of the individual against the government and insisted on the formulation of limits on all forms of political authority.¹

Thus the democratic ideas of the monarchomachs and of the representative theorists of England and of Continental

¹ "The constitutional doctrine of the seventeenth and eighteenth centuries, working with the tools of natural law, erected constitutional limitations into legal obligations founded on unimpaired contract, gave a *vis coactiva* to constitutional limitations, enforceable if necessary by the right of resistance, and posited for every state an implied constitution founded on the natural law rights of the individual and having as much force as a written constitution." Edwin M. Borchard, "Government Responsibility in Tort," *Yale Law Jour.*, XXXVI (April, 1927), 794.

Europe were made more concrete and more directly applicable to human affairs. It seems strange that this revival of the general acceptance of ideas of natural law and natural rights should have preceded by only a few decades a marked decline of the belief in natural laws of superior sanctity. Before considering the causes for this decline, it is necessary to trace briefly a similar revival of ancient superior law notions in France.

3. *French Natural Law Concepts.* The French system of law, arising as a direct development from the Roman law, was molded in its transmission through mediaeval channels in the light of the Roman and mediaeval concepts of natural law. Each variety of the concept characteristic of these periods had advocates in France. The divine sources and sanctions of natural law were particularly emphasized by French jurists of the Catholic faith. When human reason was given an important rôle in discovering natural law, it was in France that this rationalized natural law found many interpreters. The French attitude was well stated by Guizot, who said: "Any action, or any authority of man over man is legitimate only if it is in accord with reason, justice and truth, which are based on the law of God."¹ It was not until the modern period that mediaeval canon law, with its natural law principles, and local customs, often arising from similar sources, were replaced by laws emanating from a king or assembly. Fostering ideas of permanence and uniformity amidst the variations in the customary law and in the diversities of the provincial practices the natural law theories were looked upon as a factor of unity; and those favoring a united France became devoted exponents of the law of nature philosophy.²

¹ See, F. P. Guizot, *Works*, V, 60, 399, 519, and *Histoire des origines du gouvernement représentatif en Europe* (Brussels, 1851), II, Lecture X.

² Voltaire referred to natural laws and natural rights which have a fundamental and immutable character. *Oeuvres Complètes*, (new ed., Paris, 1883). In speaking of intolerance and natural law he wrote: "Natural law is that law which nature has

When the French kings in their conflict with the Papacy fell back on the practices of the Roman imperialists, they asserted principles of political supremacy which were destined to weaken the controlling force of natural law. Bodin, as we have seen, became the philosopher of royal absolutism and he relegated natural law to principles which were merely a guide to the king's conscience. To those bent upon establishing an unlimited political sovereign, superior natural laws were an obstacle to be obliterated. But higher law ideas were too well established in the legal background of French thought to be entirely discarded. Moreover, the efforts to make of the king a ruler without limits on his authority soon brought an inevitable reaction in which natural law ideas again came to the forefront. The economic and political conditions of the Ancien Régime prepared the way for the French Declaration of the Rights of Man.

Prior to the French Revolution the Physiocrats advocated the doctrine of natural rights. There is, in effect, observed Quesnay, above positive laws, a body of laws, sovereign, immutable, and inviolable. Legal rules which conform to this body of laws are valid; those which are contrary thereto are void.¹ The natural rights of the individual, they contended, comprised three species of property. "First, the property of his person which includes the right to use all his faculties, and hence the right to labor; Second, movable property which consists of the results of his labor; Third, landed property."² To the Physiocrats laws were rules of justice and morality; they were not made by men but were merely discovered. They believed that certain laws, especially those relating to liberty and property, were essential

indicated to all men." XXV, 39. At another time he referred to rights as never being established only by necessity, or force, or custom. XV, 452.

¹ Quesnay, *Traité du droit naturel*, chap. 5, p. 376. A dictum to which the Physiocrats referred was: "Ex natura jus, ordo et leges, ex hominare bitrium, regimen et coercitio."

² William A. Dunning, *Political Theories from Luther to Montesquieu*, p. 59.

to the social order and that only ordinances to carry out such laws could be made by legislatures or executives.¹ The essence of the Physiocratic doctrine was *laissez faire* in character, or to the effect that "economic law might be depended upon to bring about the best good of men and nations, if governments kept their hands off."² They insisted that governmental action ought to be restricted within the narrowest limits and individual activity ought to have every possible opportunity for expression — a doctrine which has left its impress on many of the aspects of American legal thinking. But in certain respects the ideas of the Physiocrats, as those of their predecessors, tended to favor state absolutism.

The French kings of the seventeenth and eighteenth centuries sought to assert complete control over the social and political life of the nation. Bossuet, the defender of this régime, followed Bodin and Hobbes and based the origin of all governments on force.³ Emerging doctrines of nationalism gave encouragement to the assertion of principles of state absolutism. The doctrine of individual rights as a basis to check the public powers had not yet impregnated French legal thought. Mediaeval doctrines of a superior natural law, however, served to give a sanction to the assertion of a theory of individual natural rights. Extreme instances of the use of arbitrary authority by the kings were paving the way for resistance sanctioned again by appeals to higher laws. Political theories often take their peculiar forms because of attempts on the part of those interested to defend a cause. And in this case Protestants and Catholics

¹ Cf. Henry Michel, *L'Idée de l'état* (2d ed., Paris, 1896) 17 ff.

² *Ibid.*, p. 62. For the natural law doctrines of the Physiocrats see Quesnay, *Traité du droit naturel* (1765), *L'ordre naturel et essentiel des sociétés politiques* (1767). *Physiocrates*, Par. I, 41 and Par. II, 445.

³ Henry Michel, *op. cit.*, pp. 4 ff.

following theories earlier formulated in Europe advocated limits on royal authority in the interest of the people.

Though the old French *parlements* performed in the main judicial functions as courts of the king over which he presided and whose judgments he might reverse, the natural division of powers which resulted led to the assumption of a share of the political powers by these bodies.¹ To them was accorded the duty of registering the royal edicts and in doing so they began to question the validity of the acts of the king or of his agents. As early as 1648 the *parlements* had proclaimed the necessity of "a legal order" and as a basis for such an order proposed certain fundamental laws or fundamental principles which were so essential that the king could not change them.² "Thus there appeared in an absolute monarchy, by the simple fact of the separation of powers, an organ of resistance and of control. The *parlement*, recruited from the higher middle class, claimed to be the guardian of the fundamental laws of the kingdom and considered itself as a moderating power designed to curb the excesses of royal absolutism."³ A convenient vagueness in the term "fundamental laws" encouraged the members of the *parlements* to intervene on behalf of the people whenever a favorable opportunity occurred.⁴ If need be the king could in the end secure his way by arresting and banishing the leaders of the *parlements*, but these bodies regarded themselves as mediators between the king and the people and served to keep

¹ Glasson, *Parlement de Paris et son rôle politique*.

² A. Esmein, *Cours élémentaire histoire du droit français* (11 ed., Paris, 1912), pp. 582 ff., and V. Marcaggi, *Les origines de la déclaration des droits de l'homme de 1789* (2^e ed., Paris, 1912), p. 85. Marcaggi observes that the history of the *états généraux* (States-General) is replete with illustrations of the assertion of the rights of man in opposition to the rights of the state.

³ Jean Brissaud, *A History of French Public Law*, trans. by James W. Garner in Continental Legal History Series (Boston, 1915), p. 447.

⁴ V. Marcaggi, *op. cit.* p., 98. The remonstrance of March the 4th, 1776 cited the fundamental rule of natural law which protects the rights of person and property. *Ibid.*, p. 101.

before the public a belief in fundamental laws which the king could not change.¹

Some of the *cahiers* issued preceding the French Revolution in resisting certain decrees frankly based their protests on the doctrine of fundamental and superior laws.² These mild protests accomplished little toward checking the tendencies in the direction of royal absolutism. But they strengthened the insistence on higher law ideas which were soon to find expression in the Declaration of the Rights of Man and of the Citizen.

Just as the leaders of the American Revolution appealed to the doctrine of natural and inalienable rights, so those who directed the French Revolution recognized as a fundamental truth the existence of similar rights.³ A controversy has ensued among scholars as to whether the draftsmen of the French declaration were guided by the doctrines of Montesquieu and of Rousseau as well as of their predecessors or by the previous American declarations.⁴ Whatever may be

¹ Jean Brissaud, *op. cit.*, pp. 448 ff.; Esmein, *op. cit.*, pp. 595 ff.

² Marcaggi, *op. cit.*, chap. 8.

³ Article 1 of the Declaration of the Rights of Man and of the Citizen, states that "Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general will." "The aim of all political association is the preservation of the natural and inalienable rights of man. These rights are liberty, ownership, security, and resistance to oppression." See also article 1 of the Declaration of Rights of 1793. See Robert Redslob, *Die Staatstheorien der französischen nationalversammlung von 1789* (Leipzig, 1912).

The extent to which the ideas of the Declaration of Rights are based upon the political philosophy of Grotius, Pufendorf, Burlamaqui, and Vattel, concerning the natural equality and freedom of the individual, the right to own and use property, the liberty of conscience, and the consent of the people as the source of government, is considered by Marcaggi, *op. cit.*, pp. 109 ff.

⁴ Sir Paul Vinogradoff regards the French declarations as only "the last consequences of a movement which is preëminently English and American." *Yale Law Jour.*, XXXIV, 65. George Jellinek defended the thesis that the impetus for the French Declaration was given by Rousseau and its prototype was the American Declaration of Independence. *The Declaration of the Rights of Man and of the Citizens*, trans. by Max Farrand (New York, 1901). For reply to Jellinek, see Boutmy, *Annales des sciences politiques*, July 15, 1902. See claim that the Declaration of Rights comes from Rousseau, Paul Janet, *Histoire des doctrines politiques* (2d ed.), II, 612 and Tchernoff, *Revue du droit public* (1903), II, 96. For denial of this claim cf. Léon Duguit, "The Law and the State," *Harv. Law Rev.*, XXXI (Nov. 1917), 27 ff. See

the merits of the claims of the partisans on each side it was the French Declaration which heralded to the world the great principles of natural and inalienable rights which were considered superior to all governments and which it was the prime duty of all democratic states to protect.¹ The doctrine of natural rights again based on the natural and necessary laws of a state of nature was made the very cornerstone of a political system. Differing from the major portions of the bills of rights of the American constitutions, which were comprised mainly of some of the hard-won privileges which Englishmen had acquired in centuries of conflict with their rulers, the French provisions were rather in the nature of vague theories or platitudes which had little practical meaning to the Frenchmen of the time. Similar theories were, of course, included in the Declaration of Independence and in certain provisions of the state constitutions.

Though the Declaration of the Rights of Man and the political and social philosophy involved therein left a permanent impression upon European thought, the conservative reaction which followed the French Revolution brought into disrepute natural and inalienable rights concepts which were regarded akin to ideas of violence and terrorism. It became unpopular in certain quarters to support the law of nature doctrines or to appeal to higher laws than those promulgated by the rulers. But Roman law principles and various ideas connected therewith were conducive to the

also E. Doumergue, "Les origines historiques de la Déclaration des droits de l'homme et du citoyen," *Revue du droit public*, XXI (1904), 673; and Fritz Klövekorn, *Zur Entstehung der Erklärung der Menschen und Bürgerrechte* (Berlin, 1910).

¹ Jellinek, *op. cit.*, p. 88. Marcaggi deals fully with different phases of this controversy. He concludes that the Declaration of 1789 was essentially a French product — the French Declaration presenting an interpretation, philosophic in character, of superior laws, universal and immutable, whereas the English and American bills of rights were traditional and practical in character. Jellinek declares that "whatever may be the value or worthlessness of its general phrases it is under the influence of this document that the conception of the public rights of the individual has developed in the positive law of the states of the European continent." *Op. cit.*, p. 2.

continuance of natural law doctrines. And during the nineteenth century many treatises appeared, the object of which was to adapt natural law phrases prevalent in codes and in the customary legal terminology to the peculiar conditions of the time. Various schools of legal philosophy continued to be protagonists of natural law theories when in political circles these theories were regarded as exploded vagaries. To the efforts to keep alive natural law doctrines attention will be directed later. But these efforts for the time being seemed to be obscured by the persistent influences designed to discredit natural law theories.

4. *The Decline of the Natural Rights Philosophy.* As the enthusiasm waned which fostered eighteenth-century political radicalism in America and in France and the radical movement came into disrepute in all countries it became popular to discredit the natural rights thinking. To the conservative leaders who took charge of the political destinies of the European nations after the French Revolution the inalienable rights doctrine was "an invitation to insurrection and a persistent cause of anarchy."¹ And when the reaction from the practices and the political philosophy of the American and the French Revolutions gained ascendancy in the United States one of the chief objectives was to discredit Thomas Jefferson and the tenets of the Declaration of Independence.² Both in politics and in religion, conservatism was in control, and men were disposed to welcome theories which made for social stability.³ It is well to note that it was the politicians

¹ Carl Becker, *The Declaration of Independence* (New York, 1922), pp. 256, 257. Edmund Burke styled the French Constitution of 1793 a "digest of anarchy."

² At the time of the adoption of the federal Constitution, Professor McMaster states that "we see that very scanty recognition seems to have been given to the equality of men, or to their inalienable rights to life, liberty and the pursuit of happiness." John Bach McMaster, *The Acquisition of Political, Social and Industrial Rights of Man in America* (Cleveland, 1903), p. 40.

³ Becker, *op. cit.*, p. 258. The chief object at this time was "to make terms with political democracy without opening the door to social upheaval." *Ibid.*, p. 238.

Eighteenth-century natural law developed anti-social tendencies by making the individual conscience the ultimate arbiter of political and legal obligations. Cf.

who were seeking greater political authority and those who were inclined to support absolutism in government who were chiefly concerned in the repudiation of natural rights and related natural law theories. Local justices in the application of the law to concrete cases and the people generally clung to natural law concepts long after they were thought to be repudiated in high political circles.

The anti-natural rights doctrine, according to Mr. Becker, became the accepted creed of all those who wished to be classed neither with the reactionaries nor the revolutionists, those liberal-conservatives and conservative-liberals who realized that they lived in a changing world but ardently prayed that it might not change too rapidly.

To prevent the world from changing too rapidly, nothing is more effective than to look with admiration on the past.¹

A combination of factors tended to discredit the natural rights doctrine. Politically the doctrine was used to justify not alone political democracy but also the free right of the people to change their governments — namely, as a sanction for the right of revolution.² When the right to revolt led to

Pound, *Law and Morals* (2d ed.), 88, and Justice Wilson's dictum that "The consent of those whose obedience the law requires . . . I conceive to be the true origin of the obligation of human laws." *Works* (Andrew's ed.), I, 192. David G. Ritchie set about in an extensive treatise to demolish the theories of natural rights. "I had a certain fear," he wrote, "that in criticising that famous theory I might be occupied in slaying the already slain. Recent experience has, however, convinced me that the theory is still, in a sense, alive or at least capable of mischief. . . . The real significance of the appeal to nature is, in the first place, the negative element in the appeal, it is an appeal against authorities that had lost their sacredness, against institutions that had outlived their usefulness." *Natural Rights: A Criticism of some Political and Ethical Conceptions* (London, 1895), IX, 13.

As is the case with other opponents of the doctrine the gist of Ritchie's argument centers about the use of the terms "natural" and "necessary" and some who refuse to accept his version of the use of these terms regard his criticism as largely futile and overdrawn. For instance, A. Inglis Clark believes that Ritchie's work contains "the materials for a perfect defense of the doctrine which it was written to confute." "Natural Rights," in *The Annals of the American Academy of Political and Social Science*, XVI (1900), 221.

¹ Becker, *op. cit.*, p. 266.

² Justice Wilson, an exponent of natural rights theories, believed that "no exterior human authority can bind a free and independent man." *Works* (Andrew's ed.), I, 192; cf. also, Letters of Jefferson, *Writings* (Ford's ed.), V, 115-124; X, 37, 42-45.

the Reign of Terror and its aftermath the political reaction that followed in Europe placed the stamp of disgrace on the much-heralded doctrines of the revolutionary period.¹ Michel finds that the reaction against the individualistic doctrines of the French Revolution was fairly complete by 1825. French political thought with the exception of small groups had turned away from the belief in natural rights, anterior and superior to the state. Rights were the result of laws and laws came from a state or political power with supreme authority. Public powers were limited only by the personal God of De Bonald or the Absolute of Hegel, but the sovereign alone was to be judge of the nature of these limits.² The attack on eighteenth-century individualism was encouraged and strengthened also by the economic doctrines advocated by Saint Simon and his followers. There is no place in his system for the idea of rights but instead of rights he directs attention to interests.

In America the conservative reaction which followed the periods of the Revolution and of the Confederation did not so quickly discredit the natural rights philosophy of the Declaration of Independence, but the defenders of this philosophy grew fewer in number while the critics and opponents increased.³ Some authors, Dr. Wright observes,

like Chipman, Hurlbut, Lieber, and Gerrit Smith, retain almost unchanged the traditional American theory that the basis of all laws and of all rights is to be found in the immutable truths taught by nature and to be learned by men through the use of reason, conscience, and the revealed work of God. Others, like Calhoun, Brownson,

¹ For English reactionary views, see H. J. Laski, *English Political Thought from Locke to Bentham*, pp. 243-256 and for the reaction of the historical school of jurisprudence, consult Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814).

² Michel, *op. cit.*, pp. 164-168.

³ Professor Becker thinks "the political ideas which in the United States discredited the doctrines of the Declaration of Independence were similar in essentials to those which in Europe had already deprived the Declaration of the Rights of Man of its former high prestige." *The Declaration of Independence*, p. 256.

Fitzhugh, and Hildreth, discard the idea that there are certain inalienable rights derived from nature, although in every case holding that there are basic laws or principles which underlie all government and all of the social and economic relationships of men.¹

He finds only one writer, Thomas Cooper, who attempts to refute the whole natural law theory.²

In England the natural rights theories were attacked also quite vigorously by the Social-Utilitarians who repudiated the foremost eighteenth-century political theories and made social utility the test of political institutions. Bentham, one of the leaders of this school, lent the weight of his influence against the natural law doctrines. For the idea that men had rights by nature which the sovereign was compelled to respect Bentham felt great contempt, nor did he have any confidence in the effort to place limitations on the supreme authority in a state.³ "To maintain," says Bentham, "that there is a natural right and to impose it as a limit to positive laws, to say that law cannot go against natural right, to recognize, in consequence, the right which attacks law, which overturns and annuls it, is at once to render all government impossible and to defy reason."⁴ He and his associates could see no limits to the sovereign power except restraints through the judgment of those in whom this power was reposed.

The historic method which grew in favor in history and in

¹ "American Interpretations of Natural Law," *Amer. Pol. Sci. Rev.*, XX, 536; see also Wright, "George Fitzhugh on the Failure of Liberty," *Southwestern Pol. and Soc. Sci. Quar.*, VI (December, 1925), 219.

² "American Interpretations of Natural Law," *Amer. Pol. Sci. Rev.*, XX, 537.

³ William A. Dunning, *op. cit.*, p. 217.

⁴ *Works*, I, 136. "The founders use this phrase [natural law] as if there were a code of natural laws, they appeal to these laws, they cite them, they literally oppose them to the laws of the legislators, and they do not perceive that these natural laws are of their own invention." Bentham, in *Principles of Legislation*, Part I, XIII, 46. Cf. chapter by Michel on "La réaction en Allemagne et en Angleterre," pp. 134 ff.

Sir Frederick Pollock charges Bentham with being a follower of a form of *Naturrecht* which is "no more congenial to the positive law which lawyers discuss and administer than that of Ahrens or Kant." *Science of Politics*, p. 111.

For Burke's criticism of the French theories of the rights of men consult his *Reflections on the French Revolution* (1790).

politics admitted that rights were founded in nature but identified nature with history and affirmed that the institutions of any nation were properly but an expression of the life of the people. By a change in the definition of nature the former concepts were made the basis for anti-revolutionary philosophies.

Historians such as Ranke¹ and Renan,² the philosopher, Hegel,³ and the sociologist Auguste Comte⁴ also joined the ranks of those who sought effectively to dispose of the ideas of natural rights superior to man-made regulations. And the historical school of jurists led by Savigny repudiated the eighteenth-century doctrines of natural rights and of a law of nature. To this school law existed independently of the state. It was the creation of the national consciousness or the spirit of the people and was evidenced by their customary habits. It was merely the function of the state to discover and enforce these customary laws.⁵ Rights do not belong to

¹ Cf. Friedrich Meinicke, *Die Idee der Staatsräson* (2d ed. Berlin, 1925), pp. 468, 480; also Renan, *L'Avenir de la science*.

² Renan believed that the individuals who insisted on natural or inherent rights were rarely able to appreciate them if guaranteed protection by the state, and he thought the needs of society should take precedence over individual rights. *Op. cit.*, p. 357, and *Questions contemporaines*, p. 477; cf. also, Philip G. Naserius, "The Political and Social Philosophy of Renan," *Southwestern Pol. and Soc. Sci. Quar.* VIII (June, 1927), 40, 41. Natural rights or rights belonging to the individual were to be replaced by "the right of reason to govern humanity and by rights which are the result of history."

³ *Grundlegung der Philosophie des Rechts*, secs. 104-114; Reyburn, *Hegel's Ethical Theory*, pp. 118-121; Michel, *op. cit.*, pp. 154 ff. Hegel repudiated the ideas of a state of nature and of natural rights resulting therefrom. He believed that the ultimate sanction of a state's power is force and that the prince or sovereign cannot be bound by a higher law.

⁴ "No man has any rights properly called. No one possesses any other right than that of always doing his duty." Comte, *Politique positive*, II, 361.

⁵ *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814), pp. 5 ff., and *System des heutigen Römischenrechts*, sec. 7. Consult also followers of Savigny, G. F. Puchta, *Kursus Institutionem* and F. J. Stahl, *Die Philosophie des Rechts* (Heidelberg, 1854).

"Glorification of the positive law that is, to the disparagement of the natural law that ought to be, is characteristic of the reaction that has followed the rationalistic liberalism of the Age of Enlightenment. It may be that this positivism is largely due to the expansion of modern industry and commerce which has caused lawyers to be more concerned with the protection of private economic interests than

man, as such, Savigny maintained, they are the result of positive laws. And positive laws, like language, morals, social and religious institutions, develop through the customs, habits, and traditions of a people. And with the aid of the historical jurists the older concepts of the law of nature and of natural rights were to give way to legal ideas as an outgrowth of history. Law was conceived as the unfolding of ideas of right through the customs and traditions to which people give obedience.¹ The philosophic forces at work in this development are suggestively characterized by Justice Cardozo, who observes that

the seventeenth and eighteenth centuries put their faith in Nature, and "their dominant philosophy was that of natural law." Pre-ordained and immutable were the patterns to which conformity was due. The nineteenth century put its faith in unconscious and undirected growth; and Nature dethroned as an exemplar, was made to yield place to History. "None of the nineteenth-century interpretations will hear of an element of creative activity of men as lawyers, judges, writers of books, legislators. They have nothing to say about juristic endeavors to reconcile or harmonize or compromise overlapping claims by creative reason or an inventive process of trial and error. They think of the phenomena of legal development as events, as if men were not acting in the bringing about of every one of them." In the thought of this school, law is in the grip of forces stronger than itself, which shape the path of its advance.²

Thus the historical school of jurisprudence set about to destroy all vestiges of the ideas of natural law or natural rights.³

with the larger issues of social well-being. In any case it is true that since the French Revolution, authoritarian reactionaries like De Maistre, romantic historicists like Savigny, idealizers of the actual like Hegel, utilitarians like Bentham, and positivists like Comte, have all united to heap scorn on the old liberal doctrine that men can and should change law to conform to their idea of natural law or justice." From Morris R. Cohen, "Positivism and the Limits of Idealism in the Law," *Columbia Law Review*, XXVII (March, 1927), 237.

¹ Cf. Pound, *Law and Morals*, 2d ed., pp. 15-25. Dean Pound observes that "the historical jurist merely gave us a new natural law on a new basis." *Ibid.*, p. 21.

² Review of "Interpretations of Legal History," by Pound, *Harv. Law Rev.*, XXXVII (December, 1923), 280.

³ R. Saleilles, "École historique et droit naturel d'après quelques ouvrages récents," *Revue trimestrielle de droit civil*, I (1902), 80 ff.

The natural rights philosophy received its most direct blow from the jurist John Austin and his successors who founded the analytical school of jurisprudence, and the advocates of the German theory that the state is the sole source and sanction of law, such as Ihering, Laband, and Jellinek. The Austinians conceived as the essence of the state a sovereign — a supreme, irresistible, absolute, and uncontrolled authority. The rules made or sanctioned by this authority were laws — all other rules were merely customs, habits, or moral practices. Questions relative to justice and to the aims of the law were consigned to the domain of positive morality.¹ Thus much of public law was denied the status of law, and the familiar dogmas of natural law and of inalienable rights were utterly repudiated. To the followers of Austin the attack upon natural rights, so far as such rights are accorded legal significance, is one which must be continued until no trace of the concept is left. Similar views were advocated by the supporters of the *Macht Politik* in Germany.²

Many factors and influences combined, therefore, to discredit political theorizing based on the doctrine of natural rights until it was referred to as "an exploded theory no longer believed in by any one of note."³

Natural law was absorbed as a feature of American public and private law at a time when the theories on which such a

¹ See John Austin, *Lectures on Jurisprudence*, 5th ed., edited by Robert Campbell (London, 1885), I, 86, 178; II, 567 ff.

"The whole or a portion of the laws set by God to men is frequently styled the law of nature, or natural law; being, in truth, the only natural law of which it is possible to speak without a metaphor, or without a blending of objects which ought to be distinguished. But, rejecting the appellation Law of Nature as ambiguous and misleading, I name those laws or rules as considered collectively or in a mass, the *Divine Law*, or the *Law of God*." *Ibid.*, I, 80. Austin regarded the laws of God as laws in the proper sense because they were commands. I, 89, 175, 183, 338; also, Vinogradoff, *Historical Jurisprudence*, I, 115 ff.

² Duguit, "The Law and the State," *Harv. Law Rev.*, XXXI (November, 1917), 126 ff.

³ George Lawrence Scherger, *The Evolution of Liberty* (New York, 1904), p. 11.

law was based were declining in Europe. The decadence of natural law concepts which affected the political circles mainly and which was characteristic of the decades in the middle of the nineteenth century in most European countries had its counterpart in the United States in somewhat narrowing the scope of the law of nature thinking and in giving the term a rigidity which tended to support the existing legal order. It was under these conditions that the courts fostered the gradual acceptance of some principles of natural law in the public law of the United States.

PART II

THE ACCEPTANCE OF NATURAL LAW OR SUPERIOR LAW CONCEPTS IN THE PUBLIC LAW OF THE UNITED STATES

CHAPTER IV

JUDICIAL CONSTRUCTION OF IMPLIED LIMITS ON AMERICAN LEGISLATURES

1. *Denial of the Application of Natural Law Concepts.*

Despite the recognized use and importance of natural law phrases in American law in colonial and revolutionary times, and the continual reference to such phrases in judicial decisions, it is frequently asserted that in the United States there have been merely isolated attempts to formulate a doctrine of natural law or natural rights.¹ Following the customary habit of English legal authorities of depreciating the importance of natural law theories in the growth of English law, legal writers in the United States insist that such theories have been of no practical significance in the evolution of American law. Except for its unavowed use in the applications of the rule of reason of the common law, the natural rights doctrine, after the enthusiasm of the revolutionary period had waned, was most frequently invoked by judges in those cases which involved the validity of legislative acts, tested by the terms or standards of written constitutions. The orthodox legal view, therefore, is that there is no case in which the courts have held an act invalid or refused to enforce a law because regarded as contrary to natural law, except when such a law was in conflict with an express constitutional provision.² The doctrine of natural rights then is

¹ A. W. Spencer, "The Revival of Natural Law," *Central Law Journal*, LXXX (May 7, 1915), 347.

² Cooley, *Constitutional Limitations* (8th ed., 1927), pp. 341 ff. and Robert P. Reeder "Constitutional and Extra-Constitutional Restraints," *Univ. of Penna. Law Rev.*, LXI (May, 1913), 441, 446. See comment of James B. Thayer, that "it may be remarked here that the doctrine of declaring legislative acts void as being con-

regarded as of mere academic importance and not of vital concern in the application of actual positive law in America. Others admit that the natural law concept served a useful purpose in the formative period of American constitutional law but claim that the term has now been consigned to "the museum of juristic relics."¹ An example of the prevailing view today is as follows:

They [natural rights] are, and by right ought to be, dead . . . and yet, while in this country only old judges and hopelessly antiquated text-book writers still cling to this supposedly eighteenth century doctrine, on the Continent the doctrine of natural law has been revived by advanced jurists of diverse schools.²

Most lawyers and jurists in the United States are inclined to agree with John W. Salmond that "as far as secular science is concerned, the history of the doctrine of natural law is for the most part a chapter in the history of human error." Notions of law and of obligation are, he thinks, "in the sphere of natural right, but mocking and misleading echoes." Natural law can be used by philosophers only to refer to

trary to the constitution, was probably helped into existence by a theory which found some favor among our ancestors at the time of the Revolution, that courts might disregard such acts if they were contrary to the fundamental maxims of morality, or as it was phrased, to the laws of nature. Such a doctrine was thought to have been asserted by English writers, and even by judges at times, but was never acted on. It has been repeated here, as a matter of speculation, by our earlier judges, and occasionally by later ones; but in no case within my knowledge has it ever been enforced where it was the single and necessary ground of the decision, nor can it be, unless as a revolutionary measure." "The Origin and Scope of the American Doctrine of Constitutional Law," *Harv. Law Rev.*, VII (October, 1893), 129, 133, reprinted in Thayer, *Legal Essays*, I, 6, 7.

¹ Manley O. Hudson, "Advisory Opinions of National and International Courts," *Harv. Law Rev.*, XXXVII (June, 1924), 970, 971.

² Cohen, "Jus Naturale Redivivum," *Phil. Rev.*, XXV (November, 1916), 761. "Exploded as this notion may seem to us," says Mr. Isaacs, "it is certainly in keeping with the philosophy of the eighteenth century." "John Marshall on Contracts, A Study in Early American Juristic Theory," *Va. Law Rev.*, VII (March, 1921), 413.

For the expression of similar views with the observation that the natural rights doctrine is academic and belongs to "jurisprudence in the air," see John E. Keeler, "Survival of the Theory of Natural Rights in Juridical Decisions," *Yale Law Jour.*, V (October, 1895), 14.

principles of right.¹ Political scientists have joined the lawyers in attempting to discard the use of concepts of natural law.²

It is usual to insist that natural law theories are false historically and untenable philosophically because they confound the actual and the ideal.³ The cavalier manner in which these theories are disposed of may be illustrated by the following extract:

When we come to a general philosophy of law, writers are still chopping the old worthless chaff of what they call the analytical or the historical or the *jus naturale* school, which have been the work of men not lawyers. They go on classifying, reclassifying, subdividing and resubdividing the writers upon legal philosophy and their conceptions, which have never had the slightest influence on the actual development of law. Kant's or Hegel's philosophies of law which are merely philosophies of right, the term used ambiguously, — this pale moonshine of metaphysics which never had scientific reality, — or theories of the divine origin of law or of its historical growth, or dicta of the school which bases law not on what it is, but on some assumed power that created it, are still the stuff of which legal philosophical dreams are made. We have the tangled metaphysics of Kohler, the rigid, logical deductions of the French or the practical makeshifts of the English seeking to do duty as legal philosophy.

What has always been needed is scientific study. That study asks for facts and facts alone, unclouded by hasty generalizations.⁴

2. *Natural Law Theories in the Formative Period of American Law.* Some years ago I traced in a brief summary the prevalence of the ideas associated with the doctrine of natural rights and natural law in the public law of the United States.⁵

¹ "The Law of Nature," *Law Quar. Rev.*, XI (April, 1895), 121.

² Cf. A. N. Holcombe, *The Foundations of the Modern Commonwealth* (New York, 1923), p. 438; W. F. Willoughby, *The Government of Modern States* (New York, 1919), pp. 166-168; W. W. Willoughby, *The Nature of the State* (New York, 1896), pp. 103 ff.; John W. Burgess, *Political Science and Constitutional Law*. I (New York, 1890), 88.

³ T. J. Lawrence, *A Handbook of Public International Law* (10th ed. by Percy H. Winfield, 1925), p. 6.

⁴ John M. Zane, in review of Sir Paul Vinogradoff's *Custom and Right*, *Yale Law Jour.*, XXXV (June, 1926), 1026.

⁵ "The Law of Nature in State and Federal Judicial Decisions," *Yale Law Jour.*, XXV (June, 1916), 615.

It was then indicated that those who imagine natural law theories may be consigned to the "museum of juristic relics" fail to comprehend, or to give due consideration to, one of the characteristic and significant phases in the development of American public and private law. Numerous instances were cited indicating the persistence in American judicial opinions of doctrines of natural rights and of natural laws which were regarded as limiting the exercise of all public powers. It was shown that, in the decisions of the courts in the United States, there were frequent reassertions of the old doctrines of natural rights or of natural laws despite many criticisms of these doctrines and in the face of repeated assertions that there were neither natural rights nor natural laws. And that at the time when some of the significant ideas embodied in the old doctrine were slowly being discarded they were given new vigor by incorporating them with more extensive implications in a new meaning derived from the phrase "due process of law." Merely a brief consideration can be given to the background of the natural rights philosophy in American judicial reasoning.¹

The terms "natural right" and "natural justice," which were in common use by lawyers and judges in colonial and revolutionary times, were not entirely discarded when the Declaration of Independence and its philosophy began to lose repute. Higher law concepts were made use of freely to strengthen the belief in the efficacy of written constitutions, to support the developing practice of the courts of reviewing legislative acts to test their conformity with these constitutions, and to assist in the judicial construction of implied limits on legislative powers. They were applied especially to construe limits favorable to the protection of vested contract

¹ There is a field here for much more extensive investigations than have yet been made; investigations which will effectually expose the common fallacious contention that natural rights and natural law have long since ceased to influence American law. Professor Wright is doing original work along this line in tracing the evolution of these concepts in American political theory. Cf. *supra*, pp. 53 n., 55 n.

and property rights. In developing the principle that vested rights should be protected, whether or not written provisions of laws or of constitutions required, Justices Paterson, Chase, Marshall, Story, Kent, and others made extensive use of the theories of natural and inalienable rights.¹

Natural law theories influenced various branches of private law, as it was accepted and developed in the Colonies and later when separate state governments were set up. Just as Pollock indicates in his summary of the concealed applications of these theories in English law, common law ideas embodying the rule of reason were made an integral part of the American legal practice. In fact, the application of such ideas was more extensive and persistent in the United States because of the necessity of applying principles of justice and of reason in adapting English law to American conditions and in supplementing defects in legislation, where conditions were rapidly changing. It is not within the scope of this study to enter into the details of these extensive uses of natural or higher law concepts, as they were interwoven into various branches of private law. Attention will rather be directed to the acceptance of the superior law philosophy in the development of implied limits on the activity of legislatures, and in the interpretation of the general terms of written constitutions. The natural law philosophy, which was extensively applied in the formative period of American law, soon after it came into disrepute was covertly restored and became the most prolific source of limitations on the legislatures both of the states and of the nation. So far as public law is concerned opportunities for the use of higher law doctrines occurred

¹ Consult J. B. Thayer, *Cases on Constitutional Law*, pp. 946 ff., for extracts from European natural rights philosophers which were cited by American justices; and my articles "Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures," *Texas Law Rev.*, II (April, June, 1924), 257, 387 and "Histories of the Supreme Court written from the Federalist Point of View," *Southwestern Pol. and Soc. Science Quar.*, IV (June, 1923), 12.

chiefly in connection with the review of legislative acts by the courts, and especially in that phase of review in which the justices aimed to discover implied limits on legislative powers. Hence, it is to this phase of the acceptance of higher law notions in American constitutional law to which primary consideration will be given.

3. *Higher Law Theories as a Sanction for the Establishment of the Review of Legislative Acts by Courts.* As a sanction for the moral and legal notions of a period there are what has been termed "postulates of legal thought," usually taken for granted and seldom critically examined.¹ Some such postulates or fundamental conceptions alone can account for the importance attached by the American colonists to written instruments, as fundamental charters of political organization, and to the correlative idea that judges were charged with the duty of serving as intermediaries to preserve these charters for the benefit of the people, as against actual and anticipated attacks by the other departments of government. At this time, it was generally taken for granted, in the first place, that there were natural rights inhering in the individual as such which governments could merely discover and preserve but could not legally curtail. All governmental powers were to be carefully scanned to determine whether these individual rights were not unduly interfered with. Second, there was a notion that some of the important relations and powers of government should be defined in a fundamental act or constitution, and such a constitution was considered as having a superior sanctity. It is remarkable to see how soon after their adoption the first written constitutions were looked upon with reverent awe. Third, since the preservation of individual rights and privileges often involved the application of legal terms developed largely by the courts

¹ Cf. Ludwig Ehrlich, "Proceedings against the Crown," *Oxford Studies in Social and Legal History* VI, (Oxford, 1921), 9.

and since the fundamental written charter also embodied numerous phrases of legal significance, there was a prevalent desire to turn to the courts as authoritative interpreters of the fundamental law. Especially was this true since the judges had gained prestige at times in resisting the arbitrary acts of either kings or parliaments.

The general acceptance of these postulates or assumptions accounts for the relatively few critical analyses of the arguments of the courts in favor of the doctrine that it was their duty to review legislative acts. Such postulates go far to explain not only why so few men are on record as opposed to the assumption of extraordinary powers of a quasi-legislative nature by the judiciary with no express grant to warrant it, but also why such reasoning as that of John Marshall in the case of *Marbury v. Madison* was not critically analyzed and its weaknesses pointed out for more than a decade.

The reasons for the adoption of the American doctrine of constitutional law as defined by John Marshall were as follows:

1. The Constitution is a law of superior obligation and consequently any enactments contrary thereto, which are *ipso facto* void, must be held invalid.
2. The courts must exercise this power in order to uphold the terms of a written constitution or, in other words, a written constitution necessitates the exercise of this power by the judiciary.
3. The oath of judges to support the Constitution requires that justices follow the Constitution and disregard the statute.
4. The phraseology of the Constitution warrants the exercise of such authority by the judges.

It may readily be shown, as was done by Justice Gibson in 1825,¹ that not one of the above reasons in any way explains or justifies the use of this extraordinary power by the judiciary. First, if the Constitution is a law of superior obligation, on what ground does the court insist that its judg-

¹ *Eakin v. Raub*, 12 Sergeant & Rawles 330.

ment on the meaning of the Constitution is superior to that of the legislature which has enacted the law? Second, is such a power necessary to uphold the terms of a written constitution? If so, why do many constitutions deny to the courts this extraordinary power, or why is such authority frequently considered as not within the scope of judicial functions? With regard to the oath in support of the Constitution, all officers, including the members of the legislature, the judges, and the executive take the same oath. Why does the oath of the judges give them authority to revise or condemn the judgments made by coördinate departments?

Why should a legislative act passed in due form, following all the laws of procedure, be held as never having been passed or *ipso facto* void? Is it not presumptuous to assume that the *bona fide* acts of any one department may be declared by another to be of no avail? In fact, as indicated by Justice Gibson, every argument in favor of this doctrine begins by assuming the whole ground in dispute. The unexpressed reason for the conclusions of Chief Justice Marshall was that he and his associates of the Federalist Party distrusted popular assemblies and executives who might be controlled by public opinion.

Underlying principles, then, on which the American theory of a written constitution was based are as follows:¹

First, *a distrust of legislative power*. It was generally thought, at the time that American constitutions were formed, that the legislative authority ought to be restricted and that special precautions should be taken to protect the people against legislative domination.

Second, *the protection of the minority*. To protect the minority against the danger of oppressions by majority rule was another purpose which the founders of the American government set about to accomplish in the process of consti-

¹ Cf. C. G. Haines, *The American Doctrine of Judicial Supremacy*, pp. 185 ff.

tution-making. It was thought by Madison and others that the merits of the federal Constitution lay in the fact that it secured the rights of the minority against "the superior force of an interested and overbearing majority."

Third, *the protection of property rights*. A third principle underlying the process of constitution-making was the belief that property was a sacred right, which it was the supreme function of the government to preserve and protect. Thus the major premise in drafting written instruments as a source of governmental action was a distrust in legislatures. Popular assemblies might interfere with the rights of property and contract and might not respect the liberties of the individual, and the prime object of the government was to protect such liberties. These assumptions or prevailing beliefs were predicated to a considerable extent upon the eighteenth-century notions of natural rights and upon laws of nature which were thought to be indispensable to the social compact.

The original idea of those who favored the judicial review of legislative acts seems to have been to preserve the independence of the courts as against the other departments of government, and to protect these inalienable personal and property rights.¹ There were at this time comparatively few limitations on legislative powers even when written constitutions were adopted. Some of the first state constitutions, like the present British North America Act of Canada, contained no bills of rights and few, if any, general phrases from which limitations on legislative powers might be construed.

The significance of the judicial review of statutes in the United States is due not only to the increasing tendency to restrain legislative powers by express restrictions but also to a large extent to the development of the superior law philosophy as a warrant to secure implied limits on legislatures and to certain related concepts which have made this power an

¹ Haines, *op. cit.*, pp. 287 ff.

effective means of exercising a censorship over legislative acts.¹

Among the limitations and restrictions used as tests to determine the validity of legislative acts,² resulting from the application of higher law doctrines are: implied limits on legislative powers growing out of the nature of the social compact, the fundamental principles of a free republican government, or the spirit of a written constitution based on popular sanction; limits designed to protect vested rights; and the extension of the meaning of the "due process of law" and "equal protection of the law" phrases from a limitation on executive authority only to a restriction on legislative powers.³ These limitations have been enlarged by giving greater force to the separation of power theory, and by interpreting the "due process of law" and the "equal protection of the law" phrases into a general rule of reason to measure the validity of all legislation.

Written constitutions, containing a separation of power principle and some express limits on legislative powers, might

[¹ "American courts," says Dean Pound, "unrestrained by any doctrine of Parliamentary supremacy, such as was established in England in 1688, found themselves opposed to legislatures just as English courts of the sixteenth and seventeenth centuries had been opposed to the Crown. They found in the books, over and above express constitutional limitations, vague doctrines of inherent limitations upon every form of law-making and of the intrinsic invalidity of certain laws. They soon wielded a conceded power over unconstitutional legislation." "Common Law and Legislation," *Harv. Law Rev.*, XXI (April, 1908), 383.

² In the following pages portions of a series of articles on "Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations on Legislatures," published in *Texas Law Rev.*, II (April and June, 1924), 257, 387 and *ibid.*, III (December, 1924), 1, are used by permission of the editors.

³ Upholding the inherent right of local self-government in cities and towns the Supreme Court of Nebraska referred to the principle that the state legislative power is unlimited and quoted the language of Von Holst: "This does not mean, however, that these restrictions must always be expressed in explicit words. As it is generally admitted that the factors of the federal government have certain 'implied powers,' so it has never been disputed that the state legislatures are subject to 'implied restrictions,' that is, restrictions which must be deduced from certain provisions of the federal, or state constitution, or that arise from the political nature of the Union, from the genius of American public institutions," *State v. Moores*, 55 Neb. 480, 490 (1898).

have been regarded chiefly as guides to the political departments of the government and to the electorate, as is customary in Europe. But through the adoption of the practice of judicial review of legislation, coupled with the development of implied limitations judicially enforced, written constitutions came to be regarded as rigid enactments containing superior and immutable laws and principles to which all legislative acts must be held to conform. From a mere political guide binding on the conscience of officers the written constitution became a convenient device by which individuals in the settlement of their private rights could bring the government itself to the bar of justice and require it to justify its acts, according to judicially construed standards of fairness and reasonableness.

Judicial review, then, as originally adopted, would have had relatively slight influence on the American government and politics, just as is the case in most foreign countries which have adopted this practice, but for the development of these implied restrictions arising from a revised version of natural law theories. The justices extended judicial censorship over legislative acts and, in effect, adopted Coke's idea of the supremacy of the courts over the other departments of government in applying the general doctrine that constitutional grants of power were to be interpreted according to the maxims of Magna Carta and the principles of the common law, and that legislatures were limited by superior laws, both express and implied.¹

¹ Cooley, *Constitutional Limitations*, I, 358. The underlying purpose of most of these limitations was to place "the just principles of the common law . . . beyond the power of ordinary legislation to change or control them." Justice Miller in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177 (1871); also Pound, *The Spirit of the Common Law* (Boston, 1921), p. 25.

In order to see that the limitations of the constitution were observed and that no arbitrary power was exercised by any department of government Justice Peck suggested that "the statutes and common law have laid open a warehouse of ways, means and processes, that the power of the judges may not, for want of plans, be defeated in upholding constitutional rights." *Bank of State v. Cooper*, 2 Yerg. (Tenn.) 599, 612 (1831).

4. *Limits on Legislatures resulting from the Nature of the Social Compact and from the Nature of Free Republican Governments.* The classic statement of the theory that legislative power, independent of written constitutions, was limited by the principles of republican government and of the social compact, is found in the opinion of Justice Chase in *Calder v. Bull*, in which he said:

I cannot subscribe to the *omnipotence* of a *state legislature*, or that it is *absolute and without control*; although its authority should not be *expressly* restrained by the *Constitution*, or *fundamental law*, of the state. The nature, and ends of legislative power will limit the *exercise* of it. This *fundamental* principle flows from the very nature of our free *Republican* governments, that no man should be compelled to do what the laws do not require, *nor to refrain from acts which the laws permit*. There are acts which the Federal, or State, Legislature cannot do, *without exceeding their authority*. There are certain *vital* principles in our *free Republican* governments, which will determine and overrule an *apparent and flagrant* abuse of legislative power; as to authorize *manifest injustice by positive law*; or to take away that security for *personal liberty*, or *private property*, for the protection whereof the government was established. An Act of the legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise of legislative authority*. The obligation of a law in governments established on *express compact*, and on *republican principles*, must be determined by the *nature* of the power, on which it is founded. A few instances will suffice to explain what I mean. A law that punishes a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no *existing* law; a law that destroys, or impairs, the *lawful private* contracts of citizens; a law that makes a man a *Judge in his own cause*; or a law that takes *property* from A and gives it to B. It is against all reason and justice for a people to intrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it. The *genius*, the *nature* and the *spirit*, of our State Government, amount to a prohibition of *such acts of legislation*; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may declare *new* crimes, and establish rules of conduct for *all* its citizens in *future* cases; they may *command* what is right, and *prohibit* what is wrong; but they cannot change *innocence* into *guilt*; or punish *innocence* as a *crime*; or violate the right of an *antecedent lawful private contract*; or the *right of private property*. To

maintain that our Federal, or State, Legislature possesses *such powers*, if they had not been *expressly* restrained, would, in my opinion, be a political heresy altogether inadmissible in our *free republican governments*.¹

Justice Chase's emphatic defence of the theory of implied limitations on legislative powers, resulting from the principles of the social compact and of the spirit of a free republican government, was an *obiter dictum*. However, as often occurs with opinions unnecessary to the disposition of a controversy, it was a convenient expression of doctrines of superior principles which future justices of like mind could cite as authority for placing a curb on legislatures, at times disposed to tamper with existing contract and property rights. Such a dictum served as a basis not only for a doctrine favorable to the protection of vested rights, but also for a theory of "fundamental principles" held by judges to be beyond legislative control. Judicial construction of theories favorable to the protection of vested rights against alleged harmful leg-

¹ 3 Dallas 386-389 (1798). The assertion of limitations imposed by the social compact may be illustrated by the following cases: Chief Justice Buchanan in *Regents of the University of Maryland v. Williams*, 9 Gill & J. 365, 408, 409 (1838), when a charter incorporating the regents of the university was held a contract and not subject to impairment by a subsequent legislative act, thought that independent of the provisions of the federal and state constitutions "there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact, (in this country at least) the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its authority. It is that principle which protects the life, liberty, and property of the citizen from violation, in the unjust exercise of legislative power." "With those judges, who assert the omnipotence of the legislature, in all cases, where the constitution has not interposed an explicit restraint, I cannot agree," said Chief Justice Hosmer, in *Goshen v. Stonington*, 4 Conn. 209, 225 (1822). It was claimed that an unjust infraction of vested rights must be regarded as a violation of the social compact and must be considered by the judiciary as void. Justice Butler, denying the right of the legislature to pass an unreasonable retrospective law, said: "the power of the legislature in this respect is not unlimited. They cannot entirely disregard the fundamental principles of the social compact. Those principles underlie all legislation, irrespective of constitutional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void." *Welch v. Wadsworth*, Conn. 30, 149, 155 (1861). Cf. also, *Wheeler's Appeal*, 45 Conn. 306, 315 (1877).

islative acts, and the subsequent development of Justice Chase's theory of "fundamental principles," which judges are charged to protect, will be discussed later.

5. *Construction of Limits on Legislatures to protect Vested Rights.* A significant phase of the implied limitations based on higher law ideas, held to apply to legislative powers in American constitutional law, is the doctrine of the protection of acquired or vested rights.¹ Though certain limits were suggested to the exercise of political authority with respect to private property, particularly during the Middle Ages,² the developing theory of legislative omnipotence of princes or of legislatures supported the view that private property might be taken freely for the public benefit. Eighteenth century individualism and the natural rights philosophy that accompanied it again became the basis for the insistence that state action which invaded private rights had to justify itself. Thus arose the idea which was asserted in colonial and revolutionary times that vested rights must be protected, regardless of whether express enactments or constitutional

¹ A vested right is commonly defined as a right which has been acquired by an individual under the law to do certain acts or to possess and use certain things. See Justice Chase in *Calder v. Bull*, 3 Dallas 386 (1798). Rights are regarded as vested when the right to enjoyment, present or prospective has become the property of some particular person or persons as a present interest. There is no standard of sacredness for property interests and vested rights which are beyond legislative encroachment. The term "vested rights" is regarded as one of convenience to secure certain ends and is incapable of accurate definition. It is correctly observed that the underlying idea involved in the attempt of the courts to give content to the term is political and sociological rather than legal. *Yale Law Jour.*, XXXIV (January, 1925), 306, 307. Consult this note for examples of rights becoming vested and of legislative acts held void for impairing vested rights. See also Edward S. Corwin, "A Basic Doctrine of American Constitutional Law," *Mich. Law. Rev.*, XII (February, 1914), 247. "The doctrine of vested rights," says Corwin, "represents the first great achievement of the courts after the establishment of judicial review," and "is the very matrix of constitutional limitations in this country." *Ibid.*, p. 275, and "The Extension of Judicial Review in New York: 1783-1905," *ibid.*, XV (February, 1917), 281, 297.

² The doctrine of according protection to acquired or vested rights was a feature of mediaeval law and was particularly advocated by the jurists of the sixteenth and seventeenth centuries.

limitations so required.¹ A not uncommon opinion at this time was that the sole function of government was to protect and preserve property rights.²

After the federal Constitution was put into operation, this view was reaffirmed by Justice Paterson, who insisted that "the right of acquiring and possessing property and having it protected, is one of the natural, inherent and unalienable rights of man. . . . The preservation of property, then, is the primary object of the social compact."³ The Supreme Court of North Carolina, also affirming the higher law doctrine, denied the power to the legislature to dissolve a contract.⁴

When the doctrine of legislative supremacy even over individual rights of property and contract prevailed, a few courts building upon the common law maxim that statutes ought not in doubtful cases to be given a retroactive operation laid down the doctrine as one of prime obligation that,

¹ *Symsbury Case*, Kirby (Conn.) 444, 447 (1785); *Ham v. McClaws*, 1 Bay (S. Ca.) 93, 98 (1789), in which a statute prohibiting the importation of slaves was held not to interfere with vested rights of ownership. The court said: "It is clear that statutes passed against the plain and obvious principles of common right and common reason are absolutely null and void as far as they are calculated to operate against those principles." For an English case favoring the protection of vested rights, see *Couch v. Jeffries*, 4 Burrows 2460 (1769). Lord Mansfield's judgment meant only that where at all possible a statute would be interpreted so as to preserve vested rights.

² Farrand, *Records of the Federal Convention*, I, 533-534, 541-542; II, 123.

³ *Van Horne's Lessee v. Dorrance*, 2 Dall. 304, 310 (1795). After referring to various provisions of the constitution of Pennsylvania, Justice Paterson maintained, "it is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man. . . . The legislature therefore had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without just compensation. It is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of the social alliance, in every free government; and lastly, it is contrary to the letter and spirit of the constitution." *Ibid.*, 310.

⁴ *Trustees of the University of North Carolina v. Foy*, 2 Hay (N. C.) 310, 312 (1804). It was held that "the property vested in the trustees must remain for the uses intended for the university, until the judiciary of the country in the usual and common form pronounces them guilty of such acts as will, in law, amount to a forfeiture of their rights or a dissolution of their body." Cf. dissenting opinion of Justice Hall for an argument against implied protection to vested rights.

in no case, was a statute to receive an interpretation which brought it into conflict with vested rights. So far as a statute did not impair vested rights, it was good, but so far as it did, it was void, according to the general principles underlying all constitutions.¹

Though there are few federal cases in which the doctrine favorable to the protection of vested rights on the higher law theories was affirmed prior to 1870, Chief Justice Marshall indicated his adherence to the doctrine as early as 1803, when he observed "the government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."² Later he held that an act of the legislature of Georgia, granting title to land was, so far as rights vested under the grant were concerned, a contract which could not be impaired by a subsequent act.³ "I do not hesitate to declare," said Justice Johnson in this case, "that a state does not possess the power of revoking its own grants. But I do

¹ Elliott's *Executor v. Lyell*, 3 Call. (Va. 1802), 268; *Turpin v. Lockett*, 6 Call. 113 (1804), especially opinions of Judge Tucker, 155, and of Judge Roane, 169.

² *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

³ *Fletcher v. Peck*, 6 Cranch 87 (1810). Chief Justice Marshall observed: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual fairly and honestly acquired, may be seized without compensation. . . . It is, then, the unanimous opinion of the court, that in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be legally impaired." *Ibid.* 135, 139. For an account of the circumstances leading to this case, consult Albert J. Beveridge, *The Life of John Marshall*, III (Boston, 1919), chap. 10.

For Marshall's views as to the meaning of the phrase "obligation of contract" as influenced by the eighteenth-century philosophy as to natural rights, see *Ogden v. Saunders*, 12 Wheat. 213 (1827). Marshall adverted to the fact that "the framers of our Constitution were intimately acquainted with the writings of those wise and learned men, whose treatises on the laws of nations have guided public opinion in the subjects of obligation and of contract." *Ibid.*, pp. 353, 354. Nathan Isaacs, "John Marshall on Contracts," *Va. Law Rev.*, VII (March, 1921), 411, 421 ff.

it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity.”¹

Prior to the date of this decision, leading exponents of Federalist policies such as James Wilson, Alexander Hamilton, and John Marshall had formulated as a principle of the party the theory of protecting vested rights of property and contract, both by express and implied constitutional limitations. They sponsored an independent judiciary, whose duty, they argued, was to guard the fundamental law and to check all departments of government so far as they might attempt to infringe vested rights.² The theory of affording special protection to vested rights and of securing such protection through limits defined in written constitutions and through courts whose duty it was to guard these constitutions, was a Federalist principle which continued in vogue long after the downfall of the Federalist party.³ It gained support from the liberal and democratic theories of inalienable individual rights.

The doctrine that vested rights must be protected against legislative attacks was greatly facilitated when the Supreme Court, speaking through Chief Justice Marshall, held that the clause of the federal Constitution prohibiting a state from impairing the obligation of contracts was intended to restrain state legislatures from passing any law interfering with “contracts respecting property, under which some individual could claim a right to something beneficial to himself.” The protection of this clause was then held to apply to the property of corporations as well as to that of individuals.⁴

¹ 6 Cranch 143.

² “Histories of the Supreme Court of the United States Written from the Federalist Point of View,” *Southwestern Pol. and Soc. Sci. Quar.*, IV (June, 1923), 12.

³ See Hamilton's opinion in *The Federalist*, No. 78; also Beveridge, *op. cit.* III, 568; cf. Hampton L. Carson, “James Wilson and James Iredell: A Parallel and a Contrast,” *American Bar Association Journal*, VII (March, 1921), 125 ff.; and *Wales v. Stetson*, 2 Mass. 143, 146 (1806).

⁴ *Dartmouth College v. Woodward*, 4 Wheat., 518, 628 (1819).

More positive statements of the doctrine of judicial protection to vested rights against attack by legislatures, independent of constitutional limitations, was made by Chancellor Kent and Justice Story. When facing the issue whether a statute could be given retroactive effect, Justice Kent stated in unequivocal terms the theory of implied limitations on legislative authority.¹ Basing his opinion squarely upon the natural law philosophy of European writers such as Grotius, Pufendorf, and Bynkershoek, Chancellor Kent held that the legislature can take private property for necessary or useful public uses only when public necessity requires. To render the exercise of the power valid, a principle of natural equity demands that a fair compensation must, in all cases, be previously made to the individuals affected. The limitation, he observed, "is admitted by the soundest authorities and is adopted by all temperate and civilized governments, from a deep and universal sense of justice."²

About ten years later, Kent reaffirmed these propositions,³ emphasizing the principle that the requirement of a public purpose was a true constitutional limitation susceptible of

¹ *Dash v. Van Kleeck*, 7 Johns (N. Y.) 477, 505 (1811); "It is not pretended that we have any express constitutional provisions on the subject; nor have we any for numerous other rights dear alike to freedom and justice. An *ex post facto* law in the strict technical sense of this term, is usually understood to apply to criminal cases, and that is the meaning when used in the Constitution of the United States; yet laws impairing previously acquired civil rights are equally to be condemned. We have seen that the cases in the *English* and the *Civil law* apply to such rights; and we shall find, upon further examination, that there is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally for a past innocent act, and punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of oppression and history teaches us that the government which can deliberately violate the one will soon cease to regard the other." Bracton, Pufendorf, the mediaeval natural law philosopher, and dicta in a few American decisions were cited in support of Kent's proposition.

² *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162, 166, 167 (1816). Kent felt bound "to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property." *Ibid.* 167.

³ "A retrospective statute, affecting and changing vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void." *Commentaries*, I (13th ed., 1884), 455.

judicial enforcement, and that under the power of eminent domain the legislature could not transfer the property of A to B without A's consent, unless it was clearly for a public use nor without due compensation.¹ Kent admitted that there was one limitation upon the general doctrine of the protection of vested rights, viz., that property may not be used so as to create nuisances or become dangerous to the peace, health, or comfort of the citizens. He developed, therefore, the idea of the police power, which, in certain instances, may override the rights and privileges of individual property² owners, but the right of regulation and the ultimate power of prohibition, Kent indicated, must be exercised according to principle of reasonableness, for if the legislature should take private property for uses not clearly public "such cases would be gross abuses of their discretion and fraudulent attacks on private right, and the law would be clearly unconstitutional and void." ²

Thus Kent added the weight of his opinion as justice and his authority as commentator to the view, which other justices had rather vaguely suggested, that vested rights must be protected whether or not laws or constitutional provisions so required. To the principle of just compensation in the exercise of the power of eminent domain he added the requirement of *public use* as a justification for the exercise of the power. Here were fundamental principles for placing implied limits on legislatures. When, decades later, parties imbued with nineteenth-century individualism, and corporations seeking protection of their interests, brought pressure

¹ Again citing Grotius, Pufendorf, Bynkershoek, and Vattel, Kent maintained that "a provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence is founded on natural equity, and is laid down by jurists as an acknowledged principle of universal law." *Comm.*, II, 339. Early cases sustaining this principle were cited in a footnote. *Ibid.*, pp. 339 ff. For the interpretation of public purpose as a limitation on legislatures in tax and eminent domain proceedings see Part III.

² *Comm.*, II, 340.

to bear on courts to check what appeared to be meddlesome interferences with individual liberties and property rights, these principles, closely related to the former theories of natural law, were at hand to support the developing practice of judicial review of legislative acts.

In the Supreme Court of the United States, Justice Story became the chief exponent of the doctrine of implied limitations on legislative action, when he claimed that a grant of title to land by the legislature was irrevocable upon the principles of natural justice, upon the fundamental laws of every free government, as well as under the Constitution of the United States.¹ Subsequently this idea was reiterated in more explicit terms.² A number of other justices, agreeing with Chief Justice Hosmer,³ in the decades following 1810, defended the principle of protecting vested rights, and held that, independent of written constitutions, acts interfering with acquired rights or impairing the obligation of contracts were void, for a fundamental principle of right and justice

¹ *Terrett v. Taylor*, 9 Cranch 43 (1815), in which Justice Story observed: "That the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporation exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the Constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine." *Ibid.* 52.

² *Wilkinson v. Leland*, 2 Pet. 627, 658 (1829); Justice Story said: "The fundamental maxims of free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming, that the power to violate and disregard them; a power so repugnant to the common principles of justice and civil liberty; lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people . . . a different doctrine is utterly inconsistent with the great and fundamental principle of republican government, and with the right of citizens to the free enjoyment of their property lawfully acquired. We know of no case, in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any state in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced."

³ *Goshen v. Stonington*, 4 Conn. 209 (1822).

inherent in the nature and spirit of the social compact restrained and set bounds to the power of legislation, which the legislature could not pass without exceeding its rightful authority.¹

The state constitutions frequently did not prohibit the passage of retroactive laws, but justices claimed such acts were nevertheless inhibited because they were contrary to "fundamental principles" or "the nature of free government" or "principles of the social compact" or "principles of civil liberty" or "natural rights."²

The principle of protecting vested rights both by express and implied limits on legislatures and of making it the duty of courts to hold void legislative acts interfering with these rights continued to gain adherents after the party which sponsored it had ceased to be a factor in the political life of the nation. It was supported by a common belief that there was a higher law and that there were immutable principles which, if legislatures attempted to invade, would render their acts nugatory. But this higher law was seldom resorted to, and courts rarely found it necessary to annul legislative enactments on this or on other grounds.³ Changes in political conditions and in public sentiment combined to render of little avail the weakly supported theory of protecting vested rights on the grounds of indefinite superior principles.

6. *The Main Purpose of the Establishment of Express and Implied Limits on Legislative Powers.* Constitutional limitations, as originally conceived and as continued in the growth

¹ See *Bedford v. Shilling*, 4 Serg. & R. (Pa.) 400, 405 (1818) and comment of C. J. Parker in *Rice v. Parkman*, 16 Mass. 326, 330 (1820). *Regents v. Williams*, 9 G. & J. (Md.) 365, 403 ff. (1838).

² For citation of cases, consult Bryant Smith, "Retroactive Laws and Vested Rights," *Texas Law Rev.*, V (April, 1927), 231, 237.

³ An exception to the general practice was made by the Supreme Court of North Carolina when it was held partly on the basis of the law of land provision that the legislature could not transfer an estate in an office. *Hoke v. Henderson*, 4 Dev. 1, 15 (1833); cf. also *Jones' Heirs v. Perry*, wherein a private act to sell the land of infants was held void, 10 Yerg. 59, 69 (1836).

of American constitutional law, have been regarded as self-imposed restrictions on the will of the people to check, confine, and restrict the rule of the majority. Many of the founders of the government in America agreed with Hamilton and Madison that it was necessary to check "the overbearing rule of the majority."¹ In their opinion, there could be neither justice nor stability in any system of government unless some portion of it were independent of popular control. The Federalist party under the leadership of Alexander Hamilton became the defender of this faith. It was, from the beginning, observed Martin Van Buren, "the constant aim of the late Federalists to select some department in our political system and make it the depository of power which public sentiment could not reach nor the people control."² The distrust of the capacity of the masses to govern themselves was an underlying principle of the Federalist viewpoint. Under no authority did they feel their interests to be safer than under that which was subject to the judicial power, and in no way could their policy be more effectively promoted than by taking power from those departments of the government over which the people had full control in order to concentrate it in that department over which they had practically none.³

It was to carry out this purpose that the conservatives then and since have demanded a judicial check on the other departments of government which should operate under the guise of legal channels and which would prevent popular control from seriously interfering with the interests desiring special protection. Thus it became profitable for groups of

¹ It is the opinion of Professor Dodd that "most of our legal arrangements and constitutions, both state and national, were designed to thwart and defeat democracy." Wm. E. Dodd, "The Struggle for Democracy in the United States," *Int. Jour. of Ethics*, XXVIII (July, 1918), 465.

² Martin Van Buren, *Inquiry into the Origin and Course of Political Parties in the United States*, p. 96.

³ Martin Van Buren, *op. cit.*, p. 275.

interests to combine, whose object was to control and influence the government and at the same time to check and confine the growth of popular control. Among the chief objectives of these groups were the following: to restrict the powers of the state governments; to enlarge those of the national government; to encourage a feeling of distrust of the capacity of the people to govern themselves; to control the management of public affairs and to secure special advantages to favored individuals and classes on the one hand, while designedly opposing governmental interference in private pursuits of individuals on the other. There was thus secured that effective combination described by Fisher Ames of "the lovers of liberty and the owners of property," supporting a practice whereby the courts were to act as sentinels over constitutions to preserve vested contracts and property rights and necessarily "to stay the arm of legislative, executive, or popular oppression."¹ In the armor of devices to set limits to legislative action the higher law philosophy was always available when express limits were inconclusive and inapplicable. And it was called into service at this time not as a progressive and liberal doctrine but as a conservative and authoritarian principle.

7. *A Reaction from the Federalist Doctrine of Limiting Legislative Activities.* When the Jeffersonian era of the first quarter of the nineteenth century was followed by the wave of frontier democracy, which characterized the Jacksonian epoch the general belief in the right of the people to rule left little room for doctrines of immutable principles or higher laws which were beyond governmental regulation. For several decades legislatures were accorded a freedom in dealing with the lives, liberties, and properties of individuals which would have shocked the founders of the American system of government and would be regarded as untenable

¹ Joseph Story, *Miscellaneous Writings*, p. 228.

today. The bills of rights of state constitutions were embellished with high-sounding phrases emblematical of ideas prevalent in the Declaration of Independence and in other eighteenth-century charters and documents but in practice little consideration was given to these general phrases. Thus the insertion of an elaborate clause requiring that governmental powers be carefully separated into departments did not interfere with frequent intermingling of powers among departments; and the provision that no person shall be deprived of life, liberty, or property without due process of law was seldom used to restrict political authority in favor of individual privileges. The sentiment of the time was favorable to the expansion of governmental powers rather than to a meticulous effort to find checks and limitations.¹

But in a wave of reckless and extravagant conduct usually approved by the people the legislatures sponsored all sorts of commercial projects and dealt so freely with contracts and property rights that similar to the conservative reaction, which inaugurated the federal system of government under the Constitution and placed conservative doctrines in the state constitutions, a second reaction followed calling for new limits to legislative powers. Again the doctrines of natural rights and of immutable laws were relied upon to

¹ The persistence of the natural rights philosophy in the state constitutions, Professor Becker believes, may be attributed primarily to the "conventional acceptance of a great tradition," for political leaders continued to reiterate the dogmas of the Declaration of Independence at a time when they were almost universally ridiculed as "glittering generalities." *The Declaration of Independence*, pp. 240 ff. and S. G. Brown, *Life of Rufus Choate* (ed. 1881), pp. 325, 326; see also John C. Calhoun's "Disquisition on Government." F. L. Paxson observes: "It is evident as one reads these [state] constitutions that a belief in natural rights found ready lodgment in the minds of residents along the frontier. . . . As the crown, and religion, and property lost favor as the foundations of government, nature came to be the obvious parent of democracy. . . . It became more important to preserve liberty than to get work done; more desirable to check a possible usurpation than to promote efficiency." *History of the American Frontier*, pp. 100, 101. Professor Wright believes, however, that the theories of natural law were more prevalent in eastern communities than on the frontier. Cf. "American Interpretations of Natural Law," *Amer. Pol. Sci. Rev.*, XX (August, 1926), 535, 536.

place desired limits on governmental action. The insistence on theories of popular sovereignty and some dangers believed to follow from the rule of the people led lawyers and judges to question whether an act of the legislature could not be declared void even if not in conflict with some express provision of the constitution, and to seek for other sanctions for the protection of vested rights through the interpretation of implied limitations which would prevent too serious a tampering with property rights.

8. *The Return to the Former Natural Law Theories.* Hence beginning in the decade from 1850 to 1860 there was a return to the former doctrine of natural rights and to the principle of implied limitations on legislatures resulting from the nature of free government in order to check what then seemed to be the reckless expenditure of money for the private advantage of individuals. The courts of Massachusetts recurring to the dictum of Chief Justice Parker¹ condemned legislative acts confirming conveyances and proceedings in insolvency for the reason that vested rights were protected by the inalienable rights, doctrine, and by the separation of powers and the law of the land provisions of the state constitution.²

It was the courts of New York, however, which, building upon the principles so ably defended by Chancellor Kent and becoming the champions of a new individualism, led in the revival of the earlier doctrine of protecting vested rights and

¹ *Rice v. Parkman*, 16 Mass. 326, 330 (1820). Under the general powers of the legislature to pass reasonable and wholesome laws, C. J. Parker claimed no one imagines that "the legislature could deprive a citizen of his estate, or impair any valuable contract in which he might be interested."

² *Sohier v. The Massachusetts General Hospital*, in which an act confirming conveyances was held void "as contrary to the spirit and terms of the constitution." 3 Cush. 483 (1849); *Denny v. Matton*, 84 Mass. 361 (1861). "Every individual," said Justice Fletcher, "has a right, under the constitution, to be protected in the enjoyment of his property, and no one can be wholly and entirely deprived of it, by having it taken from him and transferred to another, without compensation or benefit in any way, by a special act of legislation." 3 Cush. 493.

of placing special implied limitations on legislative powers.¹ In 1843 it was held that a statute which had been in force in the state since 1772, authorizing a private road to be laid out over the lands of a person, without his consent, was void. The law of land provision of the state constitution was then held to import, when interferences with individual rights and privileges were concerned, a trial according to the course of the common law.² Holding void a law for the protection of the property of married women, the court said, "the people of the state of New York have never delegated to the legislature the power to divest the vested rights of property legally acquired by any citizen of the state and transfer them to another against the will of the owner."³ This decision was soon followed by another of even wider application, by which the courts held that a prohibition act of the legislature of New York was void, because the act substantially destroyed the property of intoxicating liquors vested in persons within the state when the act took effect. Both upon the general ground of implied limitations and upon the concept of due process of law, it was contended that "when rights have been acquired by the citizen under the existing laws, there is no power in any branch of the government to take them away."⁴

¹ From 1840 to the Civil War "there were probably more statutes invalidated in New York on constitutional grounds than in all other states in the Union combined." Edward S. Corwin, "The Extension of Judicial Review in New York," *Mich. Law Rev.*, XV (February, 1917), 281. A considerable expansion of judicial review in New York was "due in part to the going into effect of the constitution of 1846, but in greater part to the conflict between the conservative principles of the courts and the reform tendencies of legislation, a conflict which also characterizes the ensuing decade." *Ibid.*, p. 285.

² Justice Bronson in *Taylor v. Porter*, 4 Hill 140, 146 (1843); see also dissent of Justice Nelson, in which he said "whether the security of the citizen against such arbitrary legislation . . . depends upon this clause of the constitution, or rests upon the broader and more solid ground of natural right never delegated by the people to the law-making power, it is unnecessary now to enquire." *Ibid.* 149.

³ Justice Mason in *White v. White*, 5 Barb. 474 (1849); also opinion of Justice Edwards, 12 N. Y. 202 (1854).

⁴ Justice Comstock thought the law of the land provision was "intended expressly to shield private rights from the exercise of arbitrary power." *Ibid.*, p. 398. *Wynehamer v. State of New York*, 13 N. Y. 378, 382 ff. and 416 ff. (1856); see also, the

The unique character of the reasoning of the New York court in placing implied limits on the legislature is shown in the fact that similar statutes in other states with approximately the same constitutional requirements were, as a rule, held valid.¹

The doctrine of affording judicial protection to vested rights, independent of constitutional limitations, was soon to be absorbed in the phrase "due process of law," commonly found in the state constitutions and introduced into the Fourteenth Amendment as a requirement of all state legislation which might interfere with the rights of life, liberty, or property. Its application was also made more effective by bringing to its support the principle of the separation of powers.² And certain implications of the doctrine were soon formulated which widened its scope, namely, the requirement of public use for eminent domain proceedings, and the requirement of public purpose for taxation. Thus a step was taken of greater significance than the adoption of written constitutions with certain specific limitations on legislative powers and the acceptance of the practice of judicial review

earlier opinion of Justice Barculo in *Holmes v. Holmes*, in which it was held "beyond the scope of legislative authority to destroy vested rights of property." 4 Barb. 295, 300 (1848).

¹ Cf. *State v. Noyes*, 10 Foster (N. H.) 279 (1855); *Lincoln v. Smith*, 27 Vt. 328 (1854); *Goddard v. Jacksonville*, 15 Ill. 589 (1854); *People v. Gallagher*, 3 Gibbs. (Mich.) 244 (1856); *Fisher v. McGirr*, 1 Gray (Mass.) 1 (1854); *State v. Paul*, 5 R. I. 181 (1858) and *State v. Keeran*, 5 R. I. 497. For a different conclusion see *Beebe v. State*, 6 Ind. 501, 508 (1856), holding the right to manufacture and sell spiritous liquors an inalienable right which the legislature could not take away. When in 1918 the supreme court of Indiana reversed this decision, Justice Townsend said: "This court is bound by the same constitution and has no right to curtail legislative authority this side of the expressed limitations in it. Nor has this court power to revolutionize the fundamental law by reading limitations into it." *Schmitt v. F. W. Cook Brewing Co.* 187 Ind. 623, 626. Justice Spencer dissented on the ground that the act violated "the principles of abstract justice, as they have been developed under our republican institutions." *Ibid.*, 640 ff. A suggestive discussion of the cases interpreting the doctrine of vested rights is presented by E. S. Corwin in "A Basic Doctrine of American Constitutional Law," *Mich. Law Rev.*, XII (February, 1914), 247, and "The Doctrine of Due Process of Law before the Civil War," *Harv. Law Rev.*, XXIV (March and April, 1911), 366, 460.

² *Merrill v. Sherburne*, 1 N. H. 199, 204 (1819).

of legislation to preserve these constitutions. Numerous instances of foreign governments with written constitutions and the correlative practice of judicial review of legislation give ample proof that either or both of these features may have relatively slight effect in restricting the scope of governmental powers. The doctrine requiring the protection of vested rights alone would not have given judicial review its present scope and significance. It was not until the extension of the meaning of the term "due process of law," which took place from 1850 to 1890, that the scope and significance of judicial review of legislative enactments was radically changed.

As a prelude to a general movement to return to the seemingly discredited natural law theories the Abolitionists prior to the Civil War appealed to natural rights and a higher law¹ as warranting a disregard of laws and constitutional provisions. Abraham Lincoln based his argument against slavery in the debate with Stephen A. Douglas on the dogma of the Declaration that "all men are created equal" and deduced therefrom that for one man to enslave another was contrary to the "sacred right of self-government."² The attack on slavery was generally defended on the principle of the "unalienable rights of all men to equal liberty"³—a recurrence to the type of natural law conceived as democratic and progressive.

The tendency which after 1850 sought to protect vested

¹ "Declaration of Sentiments of the American Anti-Slavery Society in Philadelphia, 1833," W. E. Channing, *Slavery* (ed. 1835), p. 31. "The Constitution regulates our stewardship. But there is a higher law than the constitution." *Works of William H. Seward*, I (Boston, 1884), 66, 74. Cf. also William Hosmer, *The Higher Law in its Relation to Civil Government with particular Reference to the Fugitive Slave Law* (1852). See also opinion of Chase in his argument relative to the unconstitutionality of the fugitive slave law in the case of *Jones v. Van Zandt*. C. E. Merriam, *American Political Theories* (New York, 1906), p. 212.

² Carl Sandburg, *Abraham Lincoln: The Prairie Years*, II (New York, 1926), 16, 17.

³ Cf. T. V. Smith, "Slavery and the American Doctrine of Equality," *South-western Pol. and Soc. Sci. Quar.*, VII (March, 1927), 333 ff.

rights against encroachments by legislative acts or by popular majorities encouraged a recurrence to the doctrine of inalienable rights and to the theory of higher laws in order to change the due process of law clause from merely a check on procedure in criminal matters to a limitation on the general scope of legislative powers. For nearly twenty years the country was absorbed in the throes of civil war and the conservative reaction which usually follows in the wake of wars furnished fruitful ground for the seeds sown in the earlier decades to take firm root. But another twenty years elapsed before the basis was firmly laid for *the modern revival of natural law ideas in American constitutional law*. These ideas have wrought a profound change in constitutional concepts. They have followed lines only vaguely or indirectly drawn during the first hundred years of constitutional development in the United States. It is necessary to turn, therefore, to the process of interpreting due process of law as a convenient phrase to convey natural law ideas.

CHAPTER V

NATURAL LAW THEORIES AND DUE PROCESS OF LAW

1. *Divergent Views on the Meaning of Due Process of Law.* The development of limitations on legislative powers in American constitutional law has been greatly modified by the interpretation of the phrase "due process of law" into a general restriction on legislative powers. As a unique product of American public law, due process of law has come to be the foundation of a considerable part of the modern structure of constitutional limitations on legislative and executive powers, and it is the main provision through which natural law theories were made a part of current constitutional law.

Reference may only be made here to a few steps in the gradual evolution of the meaning of the famous phrase "by the law of the land" as inserted in the thirty-ninth chapter of Magna Carta.¹ It is commonly conceded that the purpose of the phrase "by the law of the land," which was later transformed into the more popular form "due process of law," was intended primarily to insist upon rules of procedure in the administration of criminal justice, namely, that judgment must precede execution, that a judgment must be delivered by the accused man's "equals," and that no free man could be punished except in accordance with the law of England, *per legem terrae*.

On various occasions the original meaning of the law of the land provision was extended. Certain authorities read into

¹ For a more extensive account see W. S. McKechnie, *Magna Carta* (New York, 1915); C. H. McIlwain, "Due Process of Law in Magna Carta," *Columbia Law Review*, XIV (January, 1914), 27; Rodney L. Mott, *Due Process of Law* (Indianapolis, 1926); Malden, *Magna Carta Commemoration Essays* (London, 1917).

the phrase the requirement of an indictment by a jury¹ and the Petition of Right referred to this phrase as prohibiting the Crown from making arrests without a warrant. But in its extended form it was primarily intended as a limitation upon the Crown in the administration of justice, requiring in the apprehension and trial of criminals a procedure established by law. There are few indications that the provision was intended to serve as a limitation on the powers of Parliament. Any intimations that such a limitation was applicable to Parliament were set at rest when, after 1689, it assumed control, not only over the Crown, but also over the courts and court procedure. In England, then, prior to the eighteenth century due process of law had two fairly well recognized meanings, namely, a method of procedure in criminal trials, and a procedure following the ancient customary law or one rendered legal by parliamentary enactment. The latter meaning had almost entirely supplanted the former in English legal thought when the first American constitutions introduced the phrase into the fundamental laws of the United States.

The term "the law of the land" was inserted into the Massachusetts constitution of 1780² and soon found its place in a number of other state constitutions. That the makers of our first constitutions thought of due process of law primarily as a phrase relating to procedural limitations and not as a general limitation on legislative powers seems to be indicated by the facts — that the term "due process of law" or "the law of the land" was inserted in the part of the

¹ Coke's *Institutes*, II, 45-50; McIlwain, *The High Court of Parliament and its Supremacy*, pp. 31 ff.; Justice Curtis in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 276 (1855). For exaggerated claims regarding the significance of Magna Carta as a fundamental law designed to secure justice to all, consult Mott, *op. cit.*, chap. 3.

² "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or property but by the judgment of his peers or the law of the land." Declaration of Rights, art. XII.

constitution dealing with procedure; that the protection to be accorded through due process was left in charge of the legislature; and that, when the due process clause was first presented to the courts, it was not regarded by them as a limitation on the substantive powers of the legislature.¹ Legislative violations of due process of law in colonial times were to be corrected, as they are now in many countries, by the influence of public opinion.

Due process of law in the Fifth and Fourteenth Amendments of the federal Constitution had little significance as rendering protection either to liberty or property prior to the decade of 1870.² In the states the phrase was first given the same restricted interpretation and it was held, with only a few exceptions, not to abridge the general powers of the legislature.³

The interpretation of the origin and meaning of due process of law has led to a controversy among legal scholars which is far from settled. Some claim that these words were

¹ Cf. Edward S. Corwin, "The Doctrine of Due Process of Law before the Civil War," *Harvard Law Review*, XXIV (March, 1911), 366, 370 ff. Story in his *Commentaries on the Constitution*, published in 1833, gave the current interpretation of the phrase "due process" that it "affirms the right of trial according to the process and proceedings of the common law." Sec. 1789.

² Charles M. Hough, "Due Process of Law — Today," *Harv. Law Rev.*, XXXII (January, 1919), 218, 222 ff. Justice Hough says: "That all men of that day had no conception of due process, other than a summary description of a fairly tried action at law, is not asserted, but I do submit that reports before the Civil War yield small evidence that there was any professional conviction that it was more than that"; see also Francis W. Bird, "The Evolution of Due Process of Law in the Decisions of the United States Supreme Court," *Col. Law Rev.*, XIII (January, 1913), 37, 44 ff.

³ *State v. ———*, 1 Hay. (N. Car.) 29, 31 (1794); *per legem terrae*, Attorney General Haywood argued, was not intended "to restrain the legislature from making the law of the land, but a declaration only that the people are to be governed by no other than the law of the land." Cf. also *Mayo v. Wilson*, 1 N. H. 53 (1817), in which Chief Justice Richardson held that an arrest without warrant had always been considered due process of law in England and that "the makers of the constitution having adopted a phrase from Magna Carta, the meaning of which in that instrument was so well known, must have intended to have used it in the same sense in which it has always been understood to have been used there." 56, 57. For a different interpretation see argument in *Trustees of the University v. Foy*, 1 Murphy (N. Car., 1805) 58, 73 and opinion of Judge Locke.

intended to convey the principle that laws in their making and enforcement must not be arbitrary and must accord with natural or substantial justice; in short, must not be contrary to principles of natural law.¹ Others have contended that they were meant to provide that an individual should not be interfered with in respect to his private rights except through a regularly enacted law and formal legal procedure. The first of these views, though vaguely hinted at on a few occasions from the time of the promulgation of Magna Carta, was first effectively advanced in the writings of Sir Edward Coke and some of his followers, and in the opinions of judges in the United States, who were imbued with the idea that it was the duty of the courts to set limits to the exercise of legislative powers and were seeking a justification for such authority. As we have seen, Coke had little evidence to support his broad claims for the supremacy of the common law as interpreted by the judges, and the occasional dicta favorable to his theory have had slight influence on the growth of English law — separate from the general doctrine of the common law, when statutes did not provide contrary rules, that principles of reason and justice must be followed. But just as Coke read into the language of the cases in the *Yearbooks* and in the English reports his own political and legal notions, so his followers, and, especially, legal historians in the United States, who are interested in defending the practice of the review of legislative acts by the courts, have built an elaborate superstructure on a small foundation.²

¹ Referring to the moral and emotional values of Magna Carta which appealed to the popular imagination, McKechnie finds that "fortified as it had been by the veneration of ages, it became a strongly entrenched position that the enemies of arbitrary government could safely hold." "Magna Carta (1215-1915)," Malden, *Commemoration Essays*, pp. 20, 21. See also Sir Paul Vinogradoff, "Magna Carta Chapter 39," *Commemoration Essays*, p. 85; C. H. McIlwain, "Due Process of Law in Magna Carta," *Col. Law Rev.*, XIV (January, 1914), 26; G. B. Adams, *Origin of the English Constitution* (New Haven, 1920), pp. 242 ff.

² Starting with the assumption that somewhat of the divine essence was breathed into "due process of law" and that there is here involved "phraseology of the purest

2. *Due Process of Law as applied by the Justices of the State Courts prior to 1870.* For the first fifty years after the establishment of the state governments, the legislatures exercised with but few exceptions a virtual supremacy over the other departments. The executive was granted few powers,

gold mined under the stress of heated constitutional crises, refined by the fire of violent revolutions, proved by the acid test of centuries of struggle," a recent author sets out to prove that due process of law was always designed to keep government from straying into paths of arbitrariness and injustice. Thus imbued with the will to believe, he finds, contrary to the weight of evidence and to the mature judgments of both English and American scholars, that the phrase "the law of the land" was from the beginning intended as a restraint on the legislature as well as on the executive power, that a considerable number of acts were declared void in England because contrary to Magna Carta as the fundamental law, and that there was "a steady stream of dicta that statutes which were contrary to common right and reason, the law of nature or the common law were unenforceable." Mott, *op. cit.*, pp. 42-48, 123, 135, 142, 143.

It is surprising to find how few precedents of this kind investigators have discovered and these were given undue weight by those who desired to find legal limits on royal authority. But Dr. Mott, feeling sure that Englishmen prior to the American Revolution were well aware and confident that due process of law was designed to prevent arbitrary governmental action, is surprised to discover that no discussion of this device to keep government in the paths of reason and of justice is to be found in the Federal Convention at Philadelphia or in the debates on the constitution in the states. Madison is credited with the assertion that due process of law as inserted in the Fifth Amendment of the federal Constitution was intended to limit the legislature but nearly a hundred years elapsed before this was accepted by the courts. Again there was very little discussion of the meaning of due process of law when this clause was inserted in the Fourteenth Amendment as an extra guarantee to render effective the phrase "equal protection of the laws." Since no one knew what due process of law meant, it is concluded that it must have been intended to protect all liberties. *Ibid.*, p. 165.

The majority of text writers, it is noted, followed Justice Story in defining due process of law as a protection to the criminal from arbitrary arrest and imprisonment. With the exception of the opinions of Pomeroy and Cooley in 1868, until the beginning of the twentieth century, authors dealt only with the procedural phases of due process of law. Cooley is credited with emphasizing the application of due process of law to taxation in 1876. With such slow recognition of the significance of this term by statesmen, text writers, and the public generally, how has due process of law come to take a central place in American constitutional law? It was the "uncanny intuition" of the justices in state and federal courts, we are told, which discovered a new rôle for due process of law. Searching for "the inherent elements of justice" applicable to all situations the judges extracted from the vague terms of written charters a "latent and unsuspected" meaning which conservatives and reactionaries alike were seeking — an effective device to check popular lawmaking and to resist arbitrary administrative procedure. But even the justices were dilatory in finding the hidden meaning of due process of law. Only a few of the state justices ventured to suggest implications of the term beyond its well-known procedural implications.

was denied a veto power, and in other respects was made subordinate to the other departments. Not only did the legislature create the courts and in many respects supervise their action, but the judges were frequently selected and removed by this body; and, in certain instances, the legislature was made the final court of appeal. It was not unusual, therefore, for legislatures to decide concrete cases and to dispose of cases finally by special enactments. Though a few constitutions had provisions for the separation of governmental powers, the other portions of the constitutions so mingled the powers—and the common practice of the time favored such a mingling—that the provisions for the separation of powers had little practical effect. Judicial review of legislation as a check on these extensive legislative powers, though asserted in occasional cases, had comparatively little effect on the principle of legislative omnipotence until toward the middle of the nineteenth century. The state and federal governments were headed in a direction which, except for a rather marked change of course, would have led to conditions similar to those prevailing in England and in Canada. The affirmation of the doctrine of protecting vested rights had already indicated such a change of course and the interpretation of the law of the land provisions of the state constitutions continued the process.¹

It is not within the purpose of this study to deal with the numerous judicial decisions which approved the doctrine that the legislatures had powers as unlimited as the British Parliament, except so far as restricted by the express provisions of written constitutions. According to this doctrine the state legislatures had inherently the power to do whatever was not expressly prohibited by either the federal or state constitutions.²

¹ A. N. Holcombe, *State Government in the United States* (New York, 1916), pp. 47 ff.

² For a suggestive analysis of the inconsistent positions taken by the justices on this issue, consult Robert P. Reeder, "Constitutional and Extra-Constitutional Restraints," *University of Pennsylvania Law Review*, LXI (May, 1913), 441.

During the late eighteenth and early nineteenth centuries only an occasional judicial dictum, such as those of Justice Chase in *Calder v. Bull*,¹ and of Chief Justice Hosmer in *Goshen v. Stonington*,² denied legislative omnipotence when express constitutional restrictions were not ignored.

How, then, did the term the "law of the land," or "due process of law," come to be interpreted and understood as a general limitation on legislative powers from which extensive implied restrictions have been developed? The account of this development involves a considerable part of the growth of constitutional law in state and federal governments. Only certain phases of this growth can be briefly sketched. The development itself is intimately connected with the acceptance of the doctrine of judicial review of legislative acts, which was gradually established as a part of American constitutional law in the generation from 1780 to 1810. It was the adoption of the doctrine of judicial review that rendered it possible to give a different content to the term "due process of law," though little progress was made in this direction prior to 1850.

A pioneer case, somewhat like *Calder v. Bull* and *Dash v. Van Kleeck*³ in establishing implied limitations favorable to vested rights, involved a North Carolina act repealing an earlier grant of lands to the university in which due process of law was considered as a limitation on legislative powers.⁴

¹ 3 Dallas 398 (1798).

² 4 Conn. 209 (1822).

³ 7 Johns. 477 (1811).

⁴ *North Carolina v. Foy*, 2 Hay 310, 312; 5 N. Car. 57, 63 (1804). To the contention that the law of the land clause of the bill of rights did not impose restrictions on the legislature, Justice Locke replied: "It is evident the framers of the Constitution intended the provision as a restraint upon some branch of the government, either the executive, legislative, or judicial. To suppose it applicable to the executive would be absurd on account of the limited powers conferred on that officer; and from the subjects enumerated in that clause, no danger could be apprehended from the executive department, that being entrusted with the exercise of no powers by which the principles thereby intended to be secured could be affected. To apply it to the judiciary would, if possible, be still more idle, if the legislature can make the 'law of the land.' For the judiciary are only to expound and enforce the law, and have no discretionary powers enabling them to judge of the propriety or impropriety of laws.

In declaring this act void, the court defined the law of the land clause of the bill of rights to mean that no one shall be deprived of his liberty or property without the intervention of a court of justice, or without a jury. It was nearly a generation later that the due process clause was again defined in any effective measure as a general limitation on legislative powers.¹

Some ideas later conceived as involved in due process of law were, however, taking form. In 1814 a Massachusetts court decided that, though the legislature was given the right by the constitution to suspend the laws, such suspensions must be general, for it is "manifestly contrary to the first principles of civil liberty and natural justice, and the spirit of our constitution and laws, that any one citizen should enjoy privileges and advantages which are denied to all others under like circumstances."² The concept of equality and generality in the application of the law later held to be involved in due process of law was here extracted from the section of the bill of rights limiting the suspension of laws by the legislature. A

They are bound, whether agreeable to their ideas of justice or not, to carry into effect the acts of the legislature as far as they are binding or do not contravene the Constitution. If, then, this clause is applicable to the legislature alone, and was intended as a restraint on their acts (and to presume otherwise is to render this article a dead letter), let us next inquire what will be the operation which this clause will or ought to have on the present question. It seems to us to warrant a belief that members of a corporation as well as individuals shall not be so deprived of their liberties or properties, unless by a trial by jury in a court of justice, according to the known and established rules of decision derived from the common law and such acts of the legislature as are consistent with the Constitution."

Due process of law was held to require, for the transfer of a freehold, a trial by jury in *Bowman v. Middleton*, 1 Bay (S. Car.) 252 (1792), and an act of the North Carolina legislature was held void for attempting to prevent a judicial settlement of property rights. *Bayard v. Singleton*, 1 Martin 48 (1787).

See comments of Justice Waties by way of dictum giving a similar interpretation of *lex terrae* and suggesting that this phrase was intended "to become an effectual bar to the innovations of the legislature." *Zylstra v. Corporation of Charleston*, 1 Bay 382, 392 (1794).

¹ For more than thirty years after due process of law was introduced into the state constitutions there were few cases interpreting the phrase and no attempt to define it. See Mott, *op. cit.*, p. 192.

² *Holden v. James*, 11 Mass. 396, 405.

few years later Daniel Webster, in arguing the *Dartmouth College Case*, attributed the concept of generality in the application of legal rules to the law of the land provision,¹ and it was not long before this dictum met with approval in the state courts.² The law of the land provision was called into service also as a device to prevent retrospective legislation.³

Among the concepts regarded as belonging to due process of law none has had more significant results than the identification with this phrase of the natural and inalienable rights philosophy which was developed in the revolutionary times and was crystallized into specific form in the Declaration of Independence and in the bills of rights of state constitutions. Thus the law of the land was judicially construed to mean that no power was delegated to the legislature to invade the great *natural rights* of the individual, and that where express

¹ *Dartmouth College v. Woodward*, 4 Wheat. 518, 581 (1819). Webster observed: "By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land."

² In *Bank of State v. Cooper*, Justice Green said: "Constitutions are only intended to secure the rights of the minorities. . . . If the law be general in its operation, affecting all alike, the minority are safe, because the majority, who make the law, are operated on by it equally with the others." 2 Yerg. (Tenn.) 599, 605, 606 (1831). See also *Jones' Heirs v. Perry*, 10 Yerg. 58, 71, 72 (1836). For dicta in early cases to the effect that due process of law was intended to limit legislative action, see Mott, *op. cit.*, pp. 192 ff.

Chief Justice Skinner, holding void an act releasing a debtor imprisoned on execution, said: "An act conferring upon any one citizen privileges to the prejudice of another, and which is not applicable to others, in like circumstances . . . does not enter into the idea of municipal law, having no relation to the community in general." *Ward v. Barnard*, 1 Aikens (Vt.) 120, 128 (1825). See reference to the fact that many acts of this kind had been passed by the legislature and had been enforced without protests. Justice Catron, in upholding a special act of the legislature prescribing the mode by which holders of notes might on refusal to pay same recover judgment, referred to the law of the land as requiring "a general public law, equally binding upon every member of the community under similar circumstances." *Van Zandt v. Waddell*, 2 Yerg. (Tenn.) 260, 270, 271 (1829); also, *Wally v. Kennedy*, 2 Yerg. 554, 557 (1831) and Dale "Implied Limitations upon Legislative Powers," *American Bar Association Reports*, XXIV (1901), 294, 315-319.

³ *Hoke v. Henderson*, 15 N. Car. 1, 15 (1833); also comments of Justice Peck in *Officer v. Young*, 5 Yerg. 320, 321 (1833).

limits were lacking implied checks must be found to protect these natural rights.¹

As a rule the appeals to due process of law, as a basis for limiting the powers of the legislature, were quite different from the appeals to the same ground for protection against arbitrary commitments without a trial or a jury. In the first instance it was an appeal against the injustice of the act in the hope that the legislature itself would repeal the act (only rarely was the suggestion made that such an act was void), whereas in the second it was expected that the courts would preserve and protect the individual from an improper commitment or illegal procedure. Formerly reference to due process of law was similar to the claim now occasionally made in England that an act would be unconstitutional because contrary to the well-known and historic political principles of the past.

It remained to give somewhat more definite content to the

¹ *Bank of State v. Cooper*, 2 Yerg. 599, 603 (1831). "There are," said Justice Green, "eternal principles of justice which no government has a right to disregard. It does not follow, therefore, because there may be no restriction in the constitution prohibiting a particular act of the legislature, that such act is therefore constitutional. Some acts, although not expressly forbidden, may be against the plain and obvious dictates of reason. 'The common law,' says Lord Coke [8 Coke, 118], 'adjudgeth a statute so far void.'"

The Alabama court, holding void an act prescribing for public officers and attorneys an oath against duelling, said that the declaration of rights was the governing and controlling feature of the constitution and all powers of the legislature were to be expounded and their operation extended or restrained with reference to it. Quoting the provision of the bill of rights that "This enumeration of certain rights shall not be construed to deny or disparage others retained by the people; and to guard against any encroachment on the rights retained, or any transgression of the high powers herein delegated, we declare, that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate, and that all laws contrary thereto are void," Justice Ormond claimed that by this language the courts were authorized to declare void any act which was repugnant to natural justice and equity. Hence, "any act of the legislature which violates any of these asserted rights, or which intrenches on any of these great principles of civil liberty, or the inherent rights of man, though not enumerated, shall be void." *In re Dorsey*, 7 Porter (Ala.) 293, 377, 378 (1838). Due process of law was intended "as a safeguard against the encroachment upon these inherent rights of the people by Congress or the state legislatures." Justice Dickerson in *State v. Doherty*, 60 Me. 504, 509 (1872).

law of the land or to due process of law than generality and equality in the operation of the laws. The developing concept of protecting vested rights on the ground of implied limitations on legislative powers had already prepared the way for such a restatement and state justices soon took advantage of the opportunities afforded.¹ But the concept of due process of law as involving general limitations on legislative powers and as embodying a doctrine of natural and inalienable rights beyond governmental authority was not formulated as an effective check on legislative powers until the middle of the nineteenth century. It was at this time that the principle was being formulated by the justices that the state constitutions were not so much grants of specific powers as limitations on the exercise of general powers.²

The enormous losses entailed in building canals and supporting other internal improvements had begun to undermine the former confidence in legislative bodies. By 1856 the courts of New York found the due process of law clause a convenient term to check what was then regarded as a legislative movement to interfere with property rights. Holding invalid an act for the more effectual protection of the property of married women for the reason that the people never delegated to the legislature the power to transfer to another the vested rights of property legally acquired by a citizen, Justice Mason said:

I maintain, therefore, that the security of the citizen against such arbitrary legislation rests upon the broader and more solid ground of natural rights, and is not wholly dependent upon those negatives upon the legislative formerly contained in the constitution. It can never be admitted as a just attribute of sovereignty in a government,

¹ The "law of the land" means "the common law and the statute law existing in this state at the adoption of our constitution. Altogether they constitute the body of law, prescribing the course of justice to which a free man is to be considered amenable, in all time to come." Justice O'Neill in *State v. Simons*, 2 Spears 761, 767 (1844); also Justice Bronson in *Taylor v. Porter*, 4 Hill 140, 146 (1843).

² Justice Gilchrist in *Concord R. R. Co. v. Greeley*, 17 N. H. 47, 54 (1845); see also *Sill v. Corning*, 15 N. Y. 297, 303 (1857).

to take the property of one citizen and bestow it upon another. The exercise of such a power is incompatible with the nature and object of all government and is destructive of the great end and aim for which government is instituted, and is subversive of the fundamental principles upon which all free governments are organized.¹

Later a distinction was drawn between what was regarded as destruction and regulation by statute, and the legislature was denied the power to destroy property rights.² And due process of law was held to require procedure under a pre-existing rule of conduct by which rights were lawfully acquired and interference with these rights was prevented except by a trial and judgment according to the procedure of the common law.³

Some milestones had been passed in giving new life and vigor to this portion of "decrepit Magna Carta." The "law of the land" now being changed to the more common term "due process of law" had in a few instances been applied as a general limitation on legislative powers. It had been made a device to retain a portion of the concept of natural and inalienable rights. And it had been used as a weapon to wage

¹ *White v. White*, 5 Barb. 474, 484, 485 (1849).

² *Wynehamer v. New York*, 13 N. Y. 378 (1856), Justice Comstock, profiting by the opinions of Chief Justice Bronson in *Taylor v. Porter* and Chief Justice Rufin in *Hoke v. Henderson*, said: "The better and larger definition of *due process* of law is, that it means law in its *regular course of administration through courts of justice*. . . . It is plain, therefore, both upon principle and authority, that these constitutional safeguards, in all cases, require a judicial investigation, not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question whether, under the pre-existing rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed." *Ibid.*, 395. See dissenting opinions of Justices T. A. Johnson, Wright, and Mitchell, who objected to setting limits to legislative power "upon any fanciful theory of higher law or first principles of natural right outside of the constitution." *Ibid.*, 453.

³ *Taylor v. Porter*, 4 Hill 140 (1843); *Wynehamer v. State*, 13 N. Y. 378 (1856). When the legislature of Pennsylvania passed an act to order a sale of property contrary to the terms of a will, the supreme court held the act invalid. Referring to the "law of the land" provision, Justice Coulter said: "these clauses address themselves to the common sense of the people, and ought not to be filed away by legal subtleties. They have their foundations in natural justice; and, without their pervading efficacy, other rights would be useless. . . . If property is subject to the caprice of an annual assemblage of legislators acting tumultuously, and without rule or precedent, and without hearing the party, stability in property will cease, and justice be at an end." *Ervin's Appeal*, 16 Penn. St. 256, 263 (1851).

battle against the political liberals or radicals who were thought to be endangering property rights. So pliable a concept was likely to be made use of when economic and political conditions led conservative leaders to make strenuous efforts to place confines about the legislative domains. But at the opening of the Civil War a mere beginning had been made in the efforts to give definiteness of content to due process of law.¹

3. *Cooley's Efforts to extend the Meaning of Due Process of Law.* The vague and indefinite meaning of the term "due process of law" which prevailed prior to the Civil War was noted by Thomas M. Cooley.² After quoting a few of the cases in which the term was discussed, Cooley fell back on the general language of Daniel Webster in his argument in the *Dartmouth College Case*.³ In accord with the purpose of the author as stated in his preface, to establish limitations upon the legislative authority independent of the specific restrictions imposed by state constitutions,⁴ Judge Cooley aimed to give greater scope to the term "law of the land." For this purpose he quoted approvingly the rhetorical state-

¹ Cf. dictum of Justice Jenkins that the principle of implied limitations was applicable in the interpretation of legislative powers under the Southern Confederacy. *Jeffers v. Fair*, 33 Ga. 347, 367 (1862).

² Cf. the first edition of his work on *Constitutional Limitations* (1868), p. 353.

³ Cf. *supra*, p. 112.

⁴ The avowed object of rendering aid in the development of implied limitations on legislatures was frankly stated by Cooley in the preface to the first edition: "In these pages the author has faithfully endeavored to state the law as it has been settled by the authorities, rather than to present his own views. At the same time he will not attempt to deny — what will probably be sufficiently apparent — that he has written in full sympathy with all those restraints which the caution of the fathers has imposed upon the exercise of the powers of government, and with greater faith in the checks and balances of our republican system, and in correct conclusions by the general public sentiment, than in a judicious, prudent, and just exercise of unbridled authority by any one man or body of men, whether sitting as a legislature or as a court. In this sympathy and faith he has written of jury trial and the other safeguards to personal liberty, of liberty of the press, and of vested rights; and he has also endeavored to point out that *there are on all sides definite limitations which circumscribe the legislative authority, aside from the specific restrictions which the people impose by their constitutions.*" *Constitutional Limitations* (1st ed.), p. iv. (Italics by the writer.)

ment of Justice Johnson, containing the not uncommon inaccurate rendering of the meaning of the term "law of the land": "after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."¹ Referring to the frequent statements of the justices that they could refuse to enforce a legislative act only when in conflict with some express provision of the constitution, Cooley suggests that "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed." And then he indicates various means by which legislative acts may be regarded as invalid, if contrary to the general spirit, purposes, and principles of constitutional government. In his volume on *Constitutional Limitations* and in his work on the *Law of Taxation* he gave formulas for construing implied restrictions on legislatures. Just as Coke interpolated his ideas of limitations on the King and Parliament into common law decisions, so Cooley injected his own theories of desirable limits on legislative action into his commentaries on constitutional law. As the first attempt of an American text writer to discuss due process of law Judge Cooley's treatise had an immediate effect upon the decisions of the courts which were encouraged from many quarters to set greater limits to the exercise of legislative powers.

4. *Economic and Legal Bases for a Revival of Natural Law Thinking.* The doctrines of inalienable rights and of fundamental principles beyond legislative control served a useful purpose in revolutionary times as a higher law sanction for

¹ *Bank of Columbia v. Oakley*, 4 Wheat. 235, 244 (1819).

a revolt against constituted authority. Most reformers in attacking an established order fall back on a higher law or superior rules for guidance. These same doctrines suited well the eighteenth-century *laissez faire* theories and thus were accepted by many who with Thomas Jefferson thought "that government best which governed least." But as a ground for revolution and as a check on all governmental powers fundamental principles and inalienable rights were slowly being dissipated by the absorbing tendencies of popular control of all manner of public affairs characteristic of revolutionary and early state legislatures. It was then that Alexander Hamilton, John Marshall, and Joseph Story revived the higher law doctrine to check the legislative onslaughts on property, contracts, and vested rights generally. The tide of Jacksonian democracy, which brooked little interference with the voice of the people, narrowed these incipient checks to a relatively small circle of governmental powers. But firm believers in the necessity of limiting legislatures, such as Chancellor Kent and Judge Cooley, soon took up the higher law philosophy for the protection of vested rights and through judicial decisions as well as their writings gave credence to this philosophy. It is a significant fact that Kent and Story, who practically formulated an American common law, lost no opportunity to advocate the protection of vested rights both constitutionally and extra-constitutionally. Judge Cooley through his *Constitutional Limitations* fostered the same view. Thus a triumvirate of three great jurists and commentators was added to those conservative leaders who saw relief from legislative radicalism only in courts strengthened in their position by the authority to declare legislative acts void and aided by both express and implied limitations on legislative powers.

Judge Cooley became the most effective advocate of superior principles limiting all legislation. Reading the signs of the time favoring extensive checks on what appeared to the

conservative classes as unwarranted interferences by legislatures in personal and private affairs, he laid down as a dogma based on the higher law philosophy broad principles of implied limitations on legislatures and executives for the protection of private and personal rights. The decade in which Cooley's *Constitutional Limitations* appeared, marked the confirmation of the practice of according judicial protection to vested rights against legislative action, and of the interpretation of implied limitations on legislatures as indispensable features of American constitutional law.

The extension of the meaning and application of the term "due process of law" illustrates concretely the effect of changing economic conditions and political thought upon the courts and judicial opinions. Incipient efforts to establish implied limits on legislatures through the vested rights doctrine or through the due process of law clause, for a period of nearly fifty years, made little headway against the common belief in and practice of legislative supremacy, and the tendency to extend the scope of legislative powers. The decades from 1830 to 1850 saw a notable movement in the direction of the extension of democratic principles. It was in this decade that many of the restrictions on suffrage were removed, and the tendency was to adopt universal manhood suffrage. Terms of officers were shortened, and the executive and judicial positions of the states were in many instances made elective. The survivors of the old Federalists, who had originated the vested rights doctrine, with their principles transformed into a new Federalism, and conservative leaders generally, resisted this movement towards democracy. Being unable to prevent its spread, they became confirmed in the belief that some check had to be placed upon the seat of popular control, the legislature.

Renewed activities on the part of leaders account in a measure at least for the efforts to revise and extend the mean-

ing of due process of law, from 1830 to 1842. Conservative opinion, however, was unable to place any special checks upon the democratic movement ¹ until after the panic of 1837, and not then in a serious way until the great extension of the system of internal improvements often supported by state aid had resulted in many failures and in the repudiation of the debts of various states. The tendency of the legislatures to vote the public funds for these private enterprises, though as a rule supported by a preponderant public sentiment, and frequently approved by an almost unanimous popular vote, increased the fears of those who saw only ruin in the progressive principles of democracy; especially was this true when the business projects failed and involved the state and local governments in great financial losses. There was as a result widespread discontent among the propertied classes who now demanded greater checks upon the rule of the people. A more determined effort was made, therefore, both by the placing of express limitations on legislatures in new constitutions and by bringing pressure to bear upon the courts, to secure checks upon legislative action which might affect private contract or property rights or to prevent the majority from "an oppressive and reckless use of power." ² The doctrine of natural rights and the insistence upon inherent limitations against arbitrary government, therefore, were again

¹ "The wishes and opinions of the minority must yield to those of the majority," said Chief Justice Marshall in *Talbot v. Dent*, 9 B. Mon. (Ky.) 526, 537 (1849). Cf. for similar opinions *Goddin v. Crump*, etc., 8 Leigh (Va.) 120 (1837), and the *City of Bridgeport v. Housatonic Railroad Co.*, 15 Conn. 475 (1843).

² C. J. Bigelow in *Hood v. Lynn*, 1 Allen (Mass.) 103, 104 (1861). A representative example of this method of reasoning was the frank declaration of Justice Butler, who in reviewing a retrospective law and finding no inhibition in the constitution on this type of enactment said: "But the power of the legislature in this respect is not unlimited. They cannot entirely disregard the fundamental principles of the social compact. Those principles underlie all legislation, irrespective of constitutional restraints, and if the act in question is a clear violation of them, it is our duty to hold it abortive and void." Though the act in question was upheld, the dictum in *Goshen v. Stonington* was approved as the settled doctrine of the court. *Welch v. Wadsworth*, 30 Conn. 149, 155 (1861).

reasserted, and renewed efforts were made to add to the content and significance of the term "due process of law" to place some much-desired limits to the rule of the majority.

In the extension of the meaning of due process of law and in the development of the doctrine of protecting vested rights, an effective means was devised to guide and restrict the rule of the majority in the efforts to extend governmental regulation into the field of social and political affairs. New and varied applications of the judicial check based on implied restrictions were soon found to give legal sanction to conservative and reactionary principles in state and federal governments. These principles, which were championed by those who wished to check the tendency to regulate economic and social life, were fostered by the economic doctrine of *laissez faire*, the dominant philosophy of a pioneer individualism.¹ To support *laissez faire* principles the requirements of public purpose for taxation and public use for eminent domain were exalted into rigid standards whose application rested primarily with the judicial conscience. Also, the doctrine that there are "fundamental principles" beyond legislative authority was revived and due process of law was applied with even greater latitude so as to render invalid all governmental acts considered by judges to be unfair or arbitrary. Continuing this method of interpretation of higher law principles and adjusting it to meet some of the rapidly changing industrial conditions, the courts found additional implied

¹ The supreme court of Maine, requested to give an advisory opinion whether the legislature could pass laws enabling towns, by gifts of money, to assist individuals or corporations to engage in manufacturing, answered in the negative. Among the provisions of the constitution cited to sustain this conclusion were: the natural rights clause of the declaration of rights, the eminent domain provision, and the law of the land restriction. As these provisions did not directly inhibit such an act the justices throughout their opinion indicated their adherence to the doctrine that "the less the state interferes with industry, the less it directs and selects the channels of enterprise, the better." It is this philosophy underlying the reasoning of judges which has frequently prevented local communities from engaging in quasi-public enterprises. *In re* Opinion of Justices, 58 Me. 590, 598 (1871).

limitations upon legislative powers and completed the main structure of the modern American concept of due process of law in the period from 1870 to 1895.

Due process of law, then, was being transformed from its customary meaning in England, where it referred to procedure in accordance with a regularly enacted law, to a process which the courts regarded as "due" and, therefore, reasonable, or not unfair — a modernized version of natural law.

5. *Due Process of Law made an Agency for the Maintenance of Reactionary Tendencies.* The appearance of Cooley's *Constitutional Limitations* along with certain economic and political conditions about this time marked the beginning of a new development in American constitutional law. However, the main lines of this development were foreshadowed in the secure establishment of the doctrine of judicial review of legislation, in the growing acceptance of the idea of protecting vested rights under express and implied constitutional limits, and, in the conversion of the "law of the land" phrase into a general limitation on legislative powers. But the application of all of the above principles had resulted in the courts' declaring void but few laws and had affected to a relatively slight degree the trend of political affairs. A judicial review of legislation differentiated in any marked degree from a similar practice in other countries remained in large part to be developed, though the courts of New York and Massachusetts had taken some steps toward inaugurating a new point of view. This era was characterized by renewed applications of the doctrine of protecting vested rights and of the due process clause as a guarantee of individual rights. Certain other implied restrictions on legislatures which had been slowly emerging were now vigorously applied. These restrictions were evolved by implications from the doctrine of natural and inalienable rights, from the due process of law clause, and from the requirement that the property of the individual

could be taken under the power of eminent domain only with the granting of just compensation.

Constitutions were, as a rule, silent as to the taking of property except under the power of eminent domain and legislatures dealt rather freely with property rights short of confiscation. But the courts, inclined to discover additional limits on legislatures, beyond the express provisions of the written constitutions, originated the doctrine of public purpose as a requirement for taxation¹ and extended the application of the principle of public use for eminent domain proceedings, whether constitutions included this requirement or not.

The financial activities of the states prior to 1830 were quite limited,² but a change came when the states began to embark in commercial enterprises and particularly in the improvement of the system of transportation by building canals, and when state indebtedness was very greatly increased. "In catering to the clamor of the different interests of their respective states, eighteen of them had authorized the issue of \$108,223,808 of stock in the three and one-half years between 1835 and 1838."³ After millions had been spent in building canals and in various other public improvements, which were expected to bring large returns to the state treasuries, but which instead involved all of the states in burdensome debts that increasing taxation failed to meet, the propriety of lending the state's credit to private corporations and of taxing for this purpose was questioned.⁴ Illinois,

¹ After the middle of the nineteenth century justices continued to hold that due process of law had no relation to the power of taxation. *People v. Brooklyn*, 4 N. Y. 419, 423 (1857); *Johnson v. Stark*, 24 Ill. 75, 86 (1860); *People v. Smith*, 21 N. Y. 595, 598, 599 (1860). For additional citations see Mott, *op. cit.*, p. 438.

² Horace Secrist, *An Economic Analysis of the Constitutional Restrictions upon Public Expenditures* (University of Wisconsin, Economics and Political Science Series), VIII, 13.

³ *Ibid.*, p. 21. Cf. J. B. McMaster, *History of the People of the United States*, XI, 92, as to the wild speculation in railroad securities from 1834 to 1837.

⁴ Secrist, *op. cit.*, p. 28.

Indiana, Michigan, and other states incurred debts far beyond their ability to pay.¹ In 1842, when the panic of 1837 had left the country in a condition of economic paralysis, constitutional restrictions on the states' power to borrow money and to lend its credit to private corporations were adopted, and by 1857 most of the state constitutions contained such provisions.²

But when another wave of prosperity came in the fifties, the way was still open for the legislatures to authorize cities, counties, and towns upon a popular vote to lend money to public and private enterprises and another period of reckless borrowing followed. Money was freely voted and lavishly spent on such projects as railways, canals, manufactories, banks, and steamship lines.³ When the question as to the right of the legislatures to authorize localities to tax for these purposes was first raised, the courts generally upheld the legislative power.⁴ The panic of 1857 proved as disastrous to the ventures of the localities as did the panic of 1837 to the earlier speculative efforts of the states. A reaction followed which seriously affected American constitutional law. Efforts were begun to place greater restrictions on legislative authority in the state constitutions and a persistent sentiment was fostered that the doctrine of implied limitations ought to be applied to check the expenditure of public money for private or quasi-public enterprises.⁵

¹ McMaster, *op. cit.*, 34.

² *Ibid.*, p. 54.

³ McMaster, *op. cit.*, VIII, 285 ff.

⁴ See *Stein v. Mayor, Aldermen, etc. of Mobile*, 24 Ala. 591 (1854); *Dubuque Co. v. Dubuque and Pacific Ry. Co.*, 4 Greene (Ia.) 1 (1853); *Gelpcke v. City of Dubuque*, 1 Wall. 175 (1863); *Town of Guilford v. Supervisors of Chenango Co.*, 13 N. Y. 143 (1855); *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147 (1853); *Lawson v. The Milwaukee and Northern Ry. Co.*, 30 Wis. 597 (1872); *Commissioners of Leavenworth Co. v. Miller*, 7 Kan. 479 (1871), and dissent of Justice Brewer in *State v. Nemaha Co.*, 7 Kan. 542 (1871); and extensive list of cases cited in 20 Mich. 465. Cf. also *Railroad Co. v. County of Otoe*, 16 Wall. 667 (1872) and *Township of Pine Grove v. Talcott*, 19 Wall. 666 (1873).

⁵ Evidence of this sentiment appears in the observations of the justices in Iowa in holding invalid a legislative act amending a city charter so as to include for pur-

The growth of this sentiment and its reflection in court decisions is illustrated in the opinion of Chief Justice John F. Dillon of Iowa, who advocated judicial construction of implied limits on legislatures. When the act of the legislature authorizing local government units to aid in building railroads came before the supreme court of Iowa, Chief Justice Dillon, speaking for the majority of the court, reviewed the history of this controversy in the states.¹ Referring to a previous decision holding such an act valid,² he said the majority of the court there rendered a wrong judgment and a most unfortunate mistake was made, for counties and cities throughout the state, acting under the sanction of that decision, incurred debts amounting to several millions of dollars, and in many cases, exceeding their ability to pay. "There is no legislative power," said Judge Dillon, "to endow municipal corporations with the authority to subscribe to the stock of a railroad company and to levy a tax to pay therefor."³

On the basis of the inalienable rights clause of the bill of rights, the due process of law and eminent domain provisions of the state constitution, Chief Justice Dillon declared that the legislature cannot touch the property of the citizen for a private use even if it does make compensation.⁴ He took occasion to condemn those who enunciated the principle of

poses of taxation a large tract of farm land. There must be, said the court, some limits to the power to tax, and as a basis for these limits the distinction was suggested between a *just tax* and that which is palpably *not a tax*. *Morford v. Unger*, 8 Ia. 82, 91 (1859). Justice Leonard thought, in rendering a similar decision, that from the eminent domain provision "we may safely imply the constitutional prohibition against the arbitrary taking of private property for private use without any compensation." *Wells v. City of Weston*, 22 Mo. 385, 388 (1856).

¹ *Hanson v. Vernon*, 27 Ia. 28 (1869).

² *Dubuque County v. Dubuque and Pacific Ry. Co.*, 4 Greene 1 (1853). For cases reviewing this decision, see *State, etc. v. Wapello Co.*, 13 Ia. 388 (1862) and *McClure v. Owen*, 26 Ia. 243 (1868).

³ *Ibid.*, 33, 34.

⁴ *Hanson v. Vernon*, 27 Ia. 28, 43. See also *Bankhead v. Brown*, 25 Ia. 540, 545 (1868), where Chief Justice Dillon, reviewing proceedings to establish a private road, maintained that the constitutional limitation against taking private property for public use without just compensation "prohibits by implication, the taking of private property for any private use whatever, without the consent of the owner."

arbitrary and despotic powers in legislatures,¹ and argued extensively for the doctrine that the legislature can tax only for a public purpose.²

Justice Cole took issue with the majority of the court in his dissenting opinion. He denied that the courts had any authority to declare an act of the legislature void except when in direct conflict with the terms of the written constitution. The courts of Iowa, in previous cases, he claimed, had not denied power to the legislature to authorize cities and counties to appropriate money to railroads but had held instead that the legislature had not passed a law authorizing their issue. This issue, he continued, had been before the courts in at least twenty-one other states, and in every instance the legislative power had been affirmed. "If the views of the majority are sound," said he, "then it is certainly true that our constitution does not define the powers of the respective departments of our government, but leaves them to the necessarily uncertain and ever-changing measurement of *judicial discretion*."³

¹ Cf. *Eakin v. Raub*, 12 Serg. & R. (Penna.) 344 (1825), dissenting opinion of Justice Gibson; and *Sharpless Case*, 21 Penna. St. 147 (1853).

² 27 Ia. 46 ff. See also opinions of Justice Wright and Justice Beck. "There is," said Justice Beck, "as it were, back of the written constitution, an *unwritten constitution*, if I may use the expression, which guarantees and well protects all the absolute rights of the people." *Ibid.*, 73. See reversal of this case, *Stewart v. Supervisors of Polk Co.*, 30 Ia. 9 (1870), after the legislature had re-enacted the former law with certain changes.

³ *Hanson v. Vernon*, 27 Ia. 28 ff. For list of cases in other states, see *ibid.*, 81. In the first edition of his work on *Municipal Corporations*, published in 1872, Judge Dillon admitted that "a long and almost unbroken line of judicial decisions in the courts of most of the states has established the principle that, in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal or public corporation to aid . . . the construction of railways." Citing his own opinion in *Hanson v. Vernon*, and that of Cooley in *People v. Salem*, he observed, "the judgments affirming the existence of the power have generally met with strong judicial dissent and with much professional disapproval, and experience has demonstrated that the exercise of it has been productive of bad results." Secs. 104, 105. Cf. note summarizing the conclusions of numerous decisions. In the preface to this work Dillon indicates his disapproval of the doctrines embodied in decisions favoring such powers in the legislatures. See *Whiting v. Sheboygan and Fond du Lac Railway Co.*, 25 Wis. 167 (1869-70), where Chief Justice Dixon, holding a

Though Judge Dillon's opinion ran counter to the decisions of the highest courts in more than twenty states and was repudiated as an unsound constitutional doctrine by the Supreme Court of the United States,¹ he expressed the confident conviction that the reaction under way would soon lead to the approval of his views.

The contention that there could be no taxation for a private purpose under the conditions announced by Judge Dillon was not regarded as a principle of constitutional interpretation in the early part of the nineteenth century² but the courts were gradually prevailed on to apply a principle to taxation somewhat similar to that adopted for eminent domain proceedings.

That taxation could be for a public purpose only seems to have been announced particularly in the railway aid and military bounty cases.³ Prior to 1870, the doctrine was generally based, not upon any provision of the constitution, but upon an extra-constitutional basis, falling back upon the theory of natural rights and the inherent limitations on legislatures.⁴ Judge Cooley stated as a principle of law the suggestion by the justices in a few state cases that

Taxation having for its only legitimate object the raising of money for public purposes, and the proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power and must therefore be unauthorized. . . . An unlimited

similar statute void, cited and approved the reasoning of Dillon. For decision *contra*, cf. *Lawson v. Milwaukee and Northern Railway Co.*, 30 Wis. 597 (1872).

¹ *Gelpcke v. City of Dubuque*, 1 Wall. 175 (1864).

² *Sharpless v. Mayor of Philadelphia*, 21 Pa. St. 147 (1853); *Dubuque County v. Dubuque & Pac. Ry. Co.*, 4 Greene (Ia.) 1 (1853).

³ Cases upholding the legislative power to authorize taxation to pay bounties to soldiers: *Taylor v. Thompson*, 42 Ill. 9 (1866); *Freeland v. Hastings*, 10 Allen 570 (1865); *Speer v. School Directors, etc. of Blairsville*, 50 Pa. St. 150 (1865); but see *Tyson v. School Directors of Halifax Township*, 51 Pa. St. 9 (1865), where the court held an extreme exercise of such power void because it was not *legislation* at all. Cases denying such power to legislatures: *Mead v. Acton*, 139 Mass. 341 (1885); *State v. Tappan*, 29 Wis. 664 (1872).

⁴ Howard Lee McBain, "Taxation for a Private Purpose," *Political Science Quarterly*, XXIX (June, 1914), 185, 197 ff. Taxation for a private purpose was held invalid in *Curtis v. Whipple*, 24 Wis. 350 (1869).

power to make any and everything lawful which the legislature might see fit to call taxation would be, when plainly stated, an unlimited power to plunder the citizen.

To check such extortion, Judge Cooley suggested that the courts should interfere.¹ Citations to and approval of this dogmatic statement soon appeared in the opinions of the state courts holding that to tax for a private purpose was not among the powers conferred upon the legislature.²

Though Judge Dillon's theory of implied limitations was repudiated in Iowa and in a number of decisions by the United States Supreme Court, and though slow progress was made in construing an implied limit on the taxing power by a public purpose principle, Cooley did not hesitate to put his own theories into practice. Two years after the appearance of his *Constitutional Limitations*, as justice of the supreme court of Michigan, he reiterated the views of his text. Holding an act of the legislature void which authorized cities and towns to tax for the purpose of purchasing stock in railway companies, he wrote:

It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words.³

Three fundamental maxims of taxation were laid down as of universal application, of which public purpose was placed first. It is only when these maxims are observed, thought

¹ *Constitutional Limitations* (1868), pp. 487, 488.

² Opinion of Justices, 58 Me. 590 (1871); *People v. Batchellor*, 53 N. Y. 128 (1873). For a unique application of this doctrine see opinion of Justice Brewer holding invalid a statute providing relief for farmers whose crops had been destroyed, by means of a secured loan for the purchase of grain for seed and feed. Permanent and fundamental principles were held to prevent an act to meet a serious emergency. 14 Kan. 418 (1875).

³ *People v. Salem*, 20 Mich. 452, 473 (1870). For favorable comment on this decision by Judge Dillon, see *American Law Register*, IX (N. S., August, 1870), 501.

Justice Cooley, that "the legislative department is exercising an authority over the subject which it has received from the people."¹

From 1870 to 1880 constitutional provisions were enacted which prevented cities, counties, and towns from granting aid to private enterprises and from levying taxes for such purposes.² The decision of Justice Cooley accomplished the object of a constitutional provision against a state subsidy in Michigan. But the public purpose principle as an implied limitation had much greater effect on future legislative policies. Originally defined as a general and universal principle of taxation, Cooley developed the principle with considerable detail in his work on the *Law of Taxation*, which was published in 1879.³

"All definitions of taxation," he contended, "imply that it is to be imposed only for public purposes, and whatever difference of opinion may exist regarding the admissibility of taxation in particular cases, the fundamental requirement, that the purpose must be public, will be conceded on all sides."⁴

The determination in the first instance of what are public purposes devolves upon the legislative department but the decision of the legislative department is not conclusive, for "an unlimited power in the legislature to make any and every-

¹ *Ibid.*, pp. 474, 475. The Supreme Court of the United States rejected the reasoning of Cooley under the language of the constitution of Michigan. *Township of Pine Grove v. Talcott*, 19 Wall. 566 (1873). But Cooley adhered to his former opinion in *People v. State Treasurer*, 23 Mich. 499 (1871) and in *Thomas v. City of Port Huron*, 27 Mich. 320 (1873).

² For example, an amendment adopted in Pennsylvania in 1857 provided that "the legislature shall not authorize any county, city, borough, township, or incorporated district, by virtue of a vote of its citizens or otherwise, to become a stockholder in any company, association, or corporation, or obtain money for, or loan credit to, any corporation, association, institution or party." Art. xi, sec. 7.

³ Cf. 4th ed. by Nichols (Chicago, 1924), 4 vols.

⁴ Cooley, *Law of Taxation* (1st ed.), p. 67. In this volume Cooley affirmed adherence to the doctrine of implied limitations by asserting that "as to constitutional declarations of individual rights, many of the most important principles of government are usually not declared at all, but simply taken for granted," and such limitations, he thought, "are equally imperative whether declared or not." Page 41, note.

thing lawful which it might see fit to call taxation, would, when plainly stated, be an unlimited power to plunder the citizen." To support this doctrine, Cooley cited a few decisions of the courts of Pennsylvania, Massachusetts, and Maine, with his own decision in *People v. Salem* and the views of Judge Dillon in *Hanson v. Vernon*.¹ Then follows an extensive quotation from the dictum of Justice Miller in the case of *Loan Association v. Topeka*.²

The change in the attitude of the courts in the process of developing implied limitations on legislative authority is shown clearly in New York, where the courts rejected the principle that taxes must be for a public purpose only,³ but twenty years later, following the reasoning of Chancellor Kent and of Judge Cooley, definitely adopted the public purpose principle as a limitation upon the taxing power of the legislature.⁴

By 1880 the various ramifications of the extensive doctrine of public purpose as a requirement for taxation were clearly formulated and henceforth the courts followed Cooley and Dillon and gradually added distinctions which made of public

¹ Cooley, *op. cit.*, pp. 67, 68.

² 20 Wall. 655, 663, 664 (1874). This comment of Justice Miller is frequently cited in support of the theory of implied limitations on legislatures: "The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments, implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. . . . To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it on favored individuals to aid private enterprises and build up private fortunes, is none the less robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

³ *Guilford v. Supervisors*, 18 Barb. 615 (1854) and 13 N. Y. 143 (1856). In this case the law of the land and the eminent domain provisions were held to have no application to taxation. See legislative authorization of a tax to pay a private debt, *Thomas v. Leland*, 24 Wend. 65 (1840). But for contrary opinion see comment of Chancellor Walworth in *Cochran v. Van Surlay*, 20 Wend. 364, 373 (1838).

⁴ *Weismer v. Village of Douglas*, 64 N. Y. 92 (1876).

purpose with respect to taxation one of the most effective implied limitations on legislative powers.¹

Constitutions rather generally placed restrictions on the exercise of eminent domain, such as the requirement of public use and just compensation. But independent of such constitutional provisions and supplementary thereto arose a judicially construed limitation on such proceedings.

Chancellor Kent, who was one of the leaders in formulating the doctrine of protecting vested rights by means of implied restrictions on legislatures, it was observed, was among the first to state the special limitation as to the purpose of the power of eminent domain. In the case of *Gardner v. Newburgh*,² he held that in the absence of a constitutional provision for the purpose compensation was due the owner for property taken or damaged, and that the power of eminent domain could be exercised for public purposes only. Later he confirmed these views in his *Commentaries*. When New York adopted the constitution of 1821, a provision requiring just compensation and a public purpose was inserted as one of the requisites for eminent domain proceedings.³

About a decade later, the New York courts, considering a statute enacted more than twenty years earlier, were called upon to decide whether property could be condemned in ex-

¹ The supreme court of Maine would not allow the legislature to assist individuals or corporations to carry on manufactories. *Opinion of Justices*, 58 Me. 590 (1871); *Allen v. Jay*, 60 Me. 124 (1872). A Massachusetts court held void an act authorizing the city of Boston to issue bonds and lend the proceeds to owners of lands and buildings destroyed by fire, *Lowell v. Boston*, 111 Mass. 454 (1873); cf. also *Mead v. Acton*, 139 Mass. 341 (1885); and *Opinion of Justices*, 211 Mass. 624 (1912). An Illinois court refused to permit a levy of a tax to develop the natural advantages of a city for manufacturing purposes, *Mather v. City of Ottawa*, 114 Ill. 659 (1885). Referring to the prohibitions on cities in the raising of taxes to aid manufacturing establishments, Justice Riddell says: "We do it every day and in most, if not all, of the cities and in many of the towns and even the villages of Ontario." *Constitution of Canada* (New Haven, 1917), p. 139.

² 2 Johns. 162, 167 (1816).

³ See *Coates v. Mayor of the City of New York*, 7 Cow. 585, 589 (1827), referring to requirements of public use and just compensation as based on *principles of natural justice*.

cess of the amount actually needed for public purposes. It was observed that "the constitution, by authorizing the appropriation of private property to public use, impliedly declares that private property shall not be taken from one and applied to the use of another. It is in violation of natural right, and if not a violation of the letter of the constitution, it is of its spirit, and cannot be supported."¹ Thus the practice of excess condemnation of property beyond the actual requirements for the public needs was held to be inhibited through implication from the eminent domain clauses of the state constitutions.² For many years no further attempts were made to authorize excess condemnation of property and then adverse decisions compelled the states to resort to the amending process.³

Kent's doctrines and the theories of the New York justices had slight effect upon eminent domain proceedings, prior to 1870. Compensation was confined as a requirement by the courts to cases of actual taking, including all direct physical injuries to property,⁴ and, in determining the value of the land actually taken, it was held that elements of special benefit to the part of the land not taken could be set off against

¹ Matter of Albany street, 11 Wend. 149, 151 (1834). See also one year later, *Varick v. Smith*, 5 Paige 137, 159 (1834), in which it was contended that the exercise of the power of eminent domain for other than a public use would be an infringement upon the spirit of the constitution, and therefore not within the general powers delegated by the people to the legislature. Cf. McBain, "Taxation for a Private Purpose," *Pol. Sci. Quar.*, XXIX, 187, n, for the halting steps by which New York courts arrived at the public use doctrine as derived from the due process of law and eminent domain provisions of the state constitution.

² Cf. also *Dunn v. City Council of Charleston*, Harper's Law Repts. 189 (1824) holding that the law of the land provision prevents a taking of more property than is required for a public improvement, and *Emery v. Conner*, 3 N. Y. 511 (1850).

³ R. E. Cushman, *Excess Condemnation* (New York, 1917), chap. 7, and Frank B. Williams, *The Law of City Planning and Zoning* (New York, 1922), chap. 3. For a good brief account of the law of excess and zone condemnation in Europe see *ibid.*, chap. 2.

⁴ Wm. E. Britton, "Constitutional Changes in Eminent Domain in Illinois," *Illinois Law Bulletin*, II (April, 1920), 479. Cf. also Wilbur Larremore, "Incidental Damage to Personal Property in Condemnation Proceedings," *Col. Law Rev.* XI (February, 1911), 147. See Sedgwick, *Constitutional Law*, (2d ed.), pp. 456 ff. and Lewis, *Eminent Domain*, vol. I (3d ed.), sec. 66.

the value of the part taken.¹ With the return to conservative doctrines which followed the Civil War courts began to insist that compensation must be given for damages resulting from a taking as well as for the value of the land actually taken, that it was improper to set off special benefits to the land not taken, and to review with careful scrutiny what the legislatures declared to be a public use.²

Cooley again gave effective expression to Kent's views and to the principles stated somewhat provisionally by some state supreme court justices when he wrote:

There is no rule or principle known to our system under which private property can be taken from one man and transferred to another for the private use and benefit of such other person, whether by general laws or special enactment. The purpose must be public, and must have reference to the needs of the government. No reason of general policy will be sufficient to protect such transfers where they operate upon existing vested rights.³

This dogmatic statement by one who frankly believed in judicial construction of implied limitations on legislatures, was soon reflected in the opinions of state and federal justices.

An implied limitation, thus first formulated by the state courts, was subsequently adopted by the Supreme Court, when it was held that "the taking by a state of private property of one person or corporation without the owner's consent, for private use of another, is not due process of law, and is a violation of the Fourteenth Amendment."⁴ Justice Harlan declared that the necessity for compensation for property taken for a public use was "an affirmation of the great doctrine established by the common law for the pro-

¹ *State v. Evans*, 3 Ill. 208 (1840).

² Lewis, *op. cit.*, chap. 7.

³ *Constitutional Limitations* (1868), p. 357. See also *Lebanon School District v. Lebanon Female Seminary*, 12 Atl. 857, 859 (1888); *Justice Cooley in Detroit v. Detroit and Howell P. R. Co.*, 43 Mich. 140, 147 (1880); *People v. O'Brien*, 111 N. Y. 1 (1888).

⁴ *Mo. Pac. Ry. Co. v. Nebraska*, 164 U. S. 403 (1896).

tection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government, almost all other rights become worthless if the government possesses the uncontrollable power over the private fortune of the every-day citizen."¹

State and federal courts combined in assuming that the constitutional prohibitions against the taking of private property through eminent domain proceedings except for public purposes and without just compensation operated, by necessary implication to prevent the taking of private property for private use, with or without compensation. And the limitations thus placed upon eminent domain through the adoption of the public use principle and its acceptance as one of the features of the due process clause, added materially to the extent of the vested rights placed beyond legislative control.²

The extensive application of public purpose or public use as a limitation upon legislative powers, was therefore applied both to taxation and to eminent domain. As in the case of other implied limitations, the public purpose doctrine, so far as the federal law is concerned, was absorbed in the due process of law requirement. In defining the term "due process of law" in relation to the protection of property rights, Justice Brewer, following the opinion of Justice Miller,³ held that "this power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law that the right to compensa-

¹ Chicago, B. & Q. Ry. Co. v. Chicago, 166 U. S. 226 (1897).

² "Only a few of the state constitutions in terms prohibit the taking of property for private use. All courts, however, agree in holding that this cannot be done. Different courts find different reasons for this conclusion, some putting it on the ground of an implied prohibition in the eminent domain provisions of the constitution, some on the ground that it would be contrary to the provision that no person shall be deprived of his property except by the law of the land; others, on the ground that it would be subversive of the fundamental principles of free government, or contrary to the spirit of the constitution." Lewis, *op. cit.*, I, p. 250, and footnotes for extensive citation of cases.

³ Pumpelly v. Green Bay Co., 13 Wall. 166, 177, 178 (1871).

tion is an incident to the exercise of that power.”¹ This principle is now regarded as one of the fundamental requirements of due process of law under the Fifth Amendment, though it rests now as it always has both upon express constitutional provisions and upon an extra-constitutional basis, or upon limitations growing out “of the essential nature of all free governments.”²

When the conservative reaction was at its height numerous express constitutional restrictions upon the powers of state legislatures to take private property either by taxation or by eminent domain were adopted. But to the leaders of this reaction it was more important to have a flexible standard for the courts to use as a test of the validity of new legislative projects affecting private rights of property. The doctrines of public use and public purpose filled a gap in which the former doctrine of protecting vested rights by construing implied limitations on legislatures and the interpretation of the concept “due process of law” as a general restriction on legislative powers had so far failed to give the desired protection.

Foreign countries likewise require, as a rule, that the power of the expropriation of private property be exercised only for a public use. The determination of what is for a public use rests with the legislature, however, and there is generally no review of this determination by the courts. It is usual also to have the requirement that just compensation be awarded and the intervention of the judiciary becomes legitimate only

¹ *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 324 (1892). Justice Brewer thought the Fourteenth Amendment was intended to protect “those rights of person and property which by the Declaration of Independence were affirmed to be inalienable rights.”

² Cf. McBain, *Pol. Sci. Quar.*, XXIX, pp. 200, 201. With regard to the requirement of public purpose for taxation “a careful reading of the numerous cases,” says Professor McBain, “in which this doctrine has been announced impels the conclusion that none of them have progressed very far in the direction of finding constitutional basis for the doctrine either in express provision or reasonable implication.” *Ibid.*, 199.

when it comes to fixing the amount of compensation.¹ The French Civil Code² contains a representative provision that no one's property shall be taken except for a public use, and for a just and preliminary indemnity. In practice the legislature defines what is for a public use³ and the meaning of the term has been considerably extended by a recent act. The legislature has also limited the powers of the jury or committee of award in determining the compensation to be awarded.⁴

"The whole learning as to eminent domain," says Justice Riddell, "is of no interest in Canada. The legislature may, indeed, direct compensation to be paid; but that is in no sense necessary."⁵ But in Canada as in England, where the legislatures can, if they so choose, take private property without compensation, such power is very seldom exercised. It was the result of a long period of the growth of legal ideas and of a combination of extraordinary economic and political conditions that turned American constitutional law in this field along lines different from the prevailing practice of the world.

The federal Constitution and a number of early state constitutions were formed and put into effect on the wave of a conservative reaction from the radical and democratic doctrines of the revolutionary period.⁶ When the Federalist party became the leader of this conservative movement it championed the doctrine of judicial review of legislative en-

¹ Paul Errera, *Traité de droit public belge*, pp. 358 ff. See Constitution of Belgium (1831), art. XI.

² Art. 545. Cf. Baudry-Lacantinerie and Chauveau, *Traité théorique et pratique de droit civil* (3d ed.), VI, 161.

³ Cf. Laws of May 3, 1841, July 27, 1870, and November 6, 1918; Williams, *op. cit.*, pp. 68 ff.

⁴ Léon Duguit, *Traité de droit constitutionnel* (2d ed.), III, 358, 360.

⁵ *Constitution of Canada*, p. 131 and "The Constitutions of the United States and Canada, *Canadian Law Times*, XXXII (1912), 849.

⁶ Cf. Charles E. Merriam, *American Political Theories* (New York, 1906), chaps. 2 and 3. The contrast between the radical principles of the Revolution and the doctrines of the first conservative reaction is shown in the differences between the Pennsylvania constitution of 1776 drawn chiefly by Franklin and Bryan and the constitution of 1790 prepared by the leaders who helped secure the adoption of the federal Constitution.

actments, the theory of protecting vested rights both by express and implied limitations on legislatures, and the principle of placing implied limitations on legislatures to protect individual rights and to preserve minority privileges as against the dangers of majority rule. The wave of Jeffersonian democracy removed some of the restrictions which were in process of formation under Federalist auspices and others were either eliminated or modified when the frontier democracy of the West triumphed in the inauguration of the Jacksonian era.¹ But the conservative spirit as fostered by such men as Alexander Hamilton, John Marshall, Joseph Story, Chancellor Kent, and Daniel Webster, never ceased to have a powerful and directive influence on American political affairs. From 1830 to 1850, when democratic and liberal principles and practices seemed to be dominant in American life, a *new federalism* and a *new conservatism* were in their formative stage. It was at this time that a few justices revived the natural law doctrines of European political philosophers and the higher law notions of the Declaration of Independence and of the bills of rights of state constitutions. Following leaders who advocated implied limits on legislative powers, such as Coke, Kent, and Story, these judges, originally through dicta, prepared a program for modern conservative policies and reactionary tendencies, fostered, as was the earlier movement, on the conviction that majority rule is dangerous and that representative assemblies are not to be trusted. Not until the results of democratic rule along economic and financial lines had turned out disastrously in the panics of 1837 and 1857 and in a continuous process of wasteful and extravagant expenditures which the electorate had, as a rule, approved, did the exponents of the second conservative reaction secure much of a following. When the unsettled economic conditions and the high prices of the Civil War period, combined

¹ Merriam, *op. cit.*, chaps. 4 and 5.

with the speculative movement that followed, brought another disastrous panic in 1873, public sentiment was prepared, not only to place more definite express constitutional restrictions on legislatures, but also to accept the now well-formulated doctrine of judicially construed implied limitations on legislative powers,¹ favorable to individual privileges and to property rights.

It was the background of inalienable rights which was used to sanction Justice Cooley's dictum soon to be adopted as a fundamental principle of constitutional interpretation, namely, "that there are on all sides definite limitations which circumscribe the legislative authority, aside from the specific restrictions which the people impose by their constitutions." Justices Dillon, Miller, and Cooley gave credence to the belief that implied limits must be placed on legislatures in respect to the control over property and contracts and that the sanction for these limits may, if necessary, be founded on the inalienable rights clause of the bill of rights. There is a noteworthy similarity between the reasoning of these justices and that of Justice Chase in *Calder v. Bull* when he first advocated the doctrine of implied limitations based upon natural rights and upon the principles of a free republican government. But suggestions were already at hand to direct the natural rights thinking into other channels and to give to it a semblance of constitutional sanctity in the emerging meaning of "due process of law." Before the transition was made there was a recurrence to the principles of the Declaration of Independence as a sanction for natural rights which were inalienable.

The Supreme Court of the United States in a gradual change of opinion from 1873 to 1895 led the conservative movement, and through its prestige gave it an added impetus

¹ It is worthy of note that the leading American text writers of the middle of the nineteenth century, such as Kent, Story, Cooley, Dillon, and Sedgwick (*Constitutional Law*), were, as a rule, advocates of the doctrine that there must be implied limits on legislative powers on the basis of higher law theories.

in the state courts. When the peculiar economic and political conditions of the United States were favorable to the *laissez faire* and individualistic theories of Adam Smith and Ricardo, which were prevalent in England and in America in the eighteenth and early nineteenth centuries, Justices Field and Peckham, inclined toward democratic political principles, joined with the proponents of conservative policies, such as Justices Brewer and Harlan, to establish even greater limits on the rôle of legislative action than the most extreme advocates of the principles of the original Federalism could have imagined.¹ It is necessary then to consider the adoption of the principles of conservatism and reaction by the federal courts and the further extension of these principles by the state courts.²

¹ "The influences which produced the restrictions on debt also resulted in the introduction of a philosophy of *laissez faire*, public debt and state activity were condemned together." Secrist, *op. cit.*, p. 8.

² The point of view of conservative thinkers of the day was clearly defined by Justice Brewer in a dissenting opinion in *State v. Nemaha County*, 7 Kan. 549, 555, 556 (1871). "Looking at the provisions of the bills of rights," said Justice Brewer, "as restrictions upon an otherwise absolute supremacy in the legislature — they seem little more than 'glittering generalities.' But when we regard them as conditions upon which legislative power is granted — as the foundation principles upon which all legislative actions must be based, and a disregard of such action, void, they become substantial, prominent, vital. . . . The habit of regarding the legislature as inherently omnipotent, and looking to see what express restrictions the Constitution has placed on its action, is dangerous, and tends to error. Rather regarding first those essential truths, those axioms of civil and political liberty upon which all free governments are founded, and secondly those statements of principles in the bill of rights upon which this governmental structure is reared, we may properly then inquire what powers the words of the Constitution, the terms of the grant, convey."



PART III

THE FOURTEENTH AMENDMENT AND NATURAL LAW THEORIES



CHAPTER VI

THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION AND DUE PROCESS OF LAW¹

PRIOR to the adoption of the Fourteenth Amendment, which has been styled an "American Magna Carta," due process of law was of little significance in American constitutional law. For about three quarters of a century after the introduction of the term into the first state constitutions, it was seldom used as a basis for the protection of either personal or property rights. Few legislative enactments were held invalid as contravening due process of law, and some of the most important efforts to define the phrase were made in dicta in cases upholding the validity of the laws attacked. On the whole, the interpretation of the phrase "due process of law" or "the law of the land" prior to 1870 had placed on legislatures few restrictions which were not merely procedural in character, and had merely suggested ideas or principles which under a different environment were soon to be received favorably.

Though the Fifth Amendment provided that "no person shall . . . be deprived of life, liberty, or property, without due process of law," the federal courts were seldom called on to protect either personal privileges or property rights under this provision. And when such an attempt was made it usually resulted in failure for the litigant.²

¹ "Our constitutional liberty during the last thirty years, with comparatively few exceptions, may be said to be but little more than a commentary on the Fourteenth Amendment, which indeed nationalized the whole sphere of civil liberty. This great amendment to the Federal Constitution has done more than any other cause to protect our civil rights from invasion, to strengthen the bonds of the Union, to make us truly a nation, and to assure the perpetuity of our institutions." William D. Guthrie, *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States*, (Boston, 1898), pp. 1, 2.

² Cf. *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272

When the Fourteenth Amendment was adopted in 1868, with the proviso that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," a serious problem in constitutional interpretation arose. While the amendment was in the process of formulation in Congress there were some among the radical Republican group who wanted to change the whole plan of the federal government, as provided in the Constitution, and to place a supervisory authority over all state powers in the hands of the national authorities. The original draft of the amendment was worded so as to accomplish this object. John A. Bingham, Member of the House of Representatives, who is credited with the drafting of the original due process of law clause, said it was his object to render the principles and restrictions of the Bill of Rights of the federal Constitution applicable to the acts of the states. Conservative Republicans opposed such a change, and the original resolution was dropped and one couched in vague and general terms which proved acceptable to both the radical and the conservative wings of the Republican party, was submitted to the states for adoption.¹ There was considerable fear that sec-

(1855). Due process the court held to be a restraint on the legislative as well as the executive and judicial powers of government and a process of law which is not otherwise forbidden, and which can be shown to have had the sanction of settled usage both in England and in this country. Cf. also *Hurtado v. California*, 110 U. S. 516, 528 (1883), and *Holden v. Hardy*, 169 U. S. 366, 390 (1898). For incidental reference to the Fourteenth Amendment, see *United States v. Harris*, 106 U. S. 629 (1883); see also *Yick Wo v. Hopkins*, 118 U. S. 356. Cases in which federal acts have been held void as violating due process of law are: *Adair v. U. S.*, 208 U. S. 161 (1908); *United States v. Cohen Grocery Co.*, 255 U. S. 81 (1921); *Adkins v. Children's Hospital*, 261 U. S. 525 (1923); *Untermeyer v. Anderson*, 276 U. S. 440 (1928).

¹ Horace E. Flack, *The Adoption of the Fourteenth Amendment*, chaps. 1 and 2. Dr. Flack concludes that Congress had the following objects in view in submitting to the states the first section of the Fourteenth Amendment:

1. To make the Bill of Rights (the first eight amendments) binding upon, or applicable to, the states.
2. To give validity to the Civil Rights Bill.
3. To declare who were citizens of the United States. See pp. 92 ff.

It must not be forgotten, however, that it was a Congress dominated by the bitter

tion one of the amendment contained the germ of a policy which would mean ultimately a complete change in the relations between the nation and the states. On this ground some Republicans and nearly all of the Democrats opposed the adoption of the amendment.¹ By counting the reconstructed states, forcibly put under Republican control, the amendment was finally declared adopted with its meaning and intent very much in doubt. In the controversies over the adoption very little consideration was given to the significance of section one, the only portion which has had any noticeable effect upon the relations of the federal and the state governments.²

1. *Period of Restricted Interpretation.* Congress immediately set about through enforcement legislation to protect negro voters, to re-enact the Civil Rights Bill, and to place all violations of these measures under federal control. But when an issue involving the interpretation of the amendment came before the Supreme Court, it was decided by a close vote to reject the radical view favoring a complete change in the federal system, and the court adopted the conservative opinion of both Democrats and Republicans — that the amendment was designed primarily to protect the negro race in their newly acquired rights and privileges.³ With this

war spirit and led by the radical Reconstruction leaders of the Republican party which was responsible for the amendment, and, that a large part of the legislation enacted and of the policies fostered by these leaders was repudiated when something approaching normal political conditions was restored.

¹ Cf. B. B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867*, Columbia University Studies in History, Economics and Public Law, vol. LXII. "The line of Democratic hostility in the nation and the states was absolutely unbroken." James G. Blaine, *Twenty Years of Congress*, pp. 308-310.

² Flack, *op. cit.*, p. 208. "The Fourteenth [Amendment] was a straight party measure, due to the distrust of the states solely in respect of their possible treatment of the negro. The sufficient proof of party spirit is that in all the legislatures of all the states exactly one Democrat voted for it." Charles M. Hough, "Due Process of Law — Today," *Harvard Law Review*, XXXII (January, 1919), 220.

³ The Slaughter-House Cases, 16 Wall. 36 (1872). See Edward S. Corwin "The Supreme Court and the Fourteenth Amendment," *Michigan Law Review*, VII (June, 1909), 643.

exception the states, it was thought, were left as free to regulate their affairs as they were before the Civil War. Thus interpreted, "due process of law" and the "equal protection of the laws" would have had little effect on the normal field of state functions. But four members of the court dissented, and Justice Field in his dissent expressed the view that it was the intention of the Fourteenth Amendment to "protect the citizens of the United States against the deprivation of their common rights by state legislation."¹ Here was a suggestion favorable to special interests desiring protection, and counsel were not slow to urge upon the court that the new amendments were intended to place the whole jurisprudence of the country under the protection of the Supreme Court.² The majority of the justices, however, saw no reason for taking such a significant step, and chose rather to adhere to the time-honored interpretation of due process of law. The effect of this and similar decisions³ was to leave relatively little power to enforce the amendment in the hands of Congress, and to transfer its definition and application primarily to the courts. And for ten years the federal courts consistently discouraged litigation under the amendment — so much so that only nine cases were considered in a decade. This attitude may have been due in part to the fear that Congress, which had overridden both the executive and the courts in carrying out its reconstruction policies, would unduly interfere with the powers of the states. From 1877 to 1885 twenty-six additional cases were adjudicated under this amendment, making a total of thirty-five cases in sixteen years. Considering the fact that a considerable number of these cases were either unimportant or trivial, it seemed that

¹ 16 Wall. 89.

² *Murdock v. Memphis*, 20 Wall. 590, 599 (1874).

³ See *United States v. Cruikshank*, 92 U. S. 542 (1875). But Chief Justice Waite threw out the suggestion that the Fourteenth Amendment "furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society." *Ibid.*, 554. 'A

the adoption of the Fourteenth Amendment had affected but slightly the powers of the states as they existed prior to the Civil War.¹

Justice Miller thought that the just compensation principle of the Fifth Amendment was not comprehended under the Fourteenth Amendment. It seemed to him

not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised have been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution as a restraint upon the powers of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty or property, without due process of law. There is here abundant evidence that there exists some strange misconception of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the attention or the decision of this court the abstract opinion of every unsuccessful litigant in the state courts, or jury of the decision against him, and of the merits of the legislation upon which such decisions may be founded.²

¹ Prior to 1883 "appeals to due process of law in the federal courts were rare, and (barring the negro cases) never successful, except on the procedural side." *Pennoy v. Neff*, 95 U. S. 714 (1877) is called a "monument" of the latter type of decision. Cf. Hough, *op. cit.*, p. 218.

² *Davidson v. New Orleans*, 96 U. S. 97, 103-104 (1877). It was in this case in which Justice Miller, refusing to define due process of law, said: "There is wisdom, we think, in the ascertaining of the intent and application of such an important phrase in the federal Constitution, by the gradual process of inclusion and exclusion, as the cases presented shall require." *Ibid.*, 104.

Referring to the above observation of Justice Miller in 1885, Justice Field remarked that after the lapse of eight years, it may be repeated with an expression of increased surprise at the continued misconception of the purpose of this provision." *Missouri Pacific Railway v. Humes*, 115 U. S. 512, 520 (1885). For a change in the position of the court see opinion of Justice Gray in *Missouri Pacific Railway v. Nebraska*, 164 U. S. 403, 417 (1896). A requirement that a company lease its property to a private party was held to be a taking of property and a denial of due process of law. *Chicago, Burlington and Quincy Ry. Co. v. Chicago*, 166 U. S.

When an attempt was made to secure protection under the due process clause from legislative regulation of private business the court again refused to accept the extended application of due process of law.¹

When the argument was presented that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question, the answer was given by the court that the practice has been otherwise.²

That this power might be abused, it was admitted, but for protection against abuses by legislatures, the court replied, "the people must resort to the polls, not to the courts."³ The controlling fact was held to be the power to regulate at all. If that existed the right to establish the maximum charge as one of the means of regulation was implied. In short, the issue was regarded as a political question, and was referred to the political departments of the government. A dissenting opinion by Justices Field and Strong emphasized the importance of judicial determination of questions of this nature. The majority opinion was condemned as "subver-

226, 233, 241 (1896). Henceforth it was regarded as settled that a state might not under the due process provision take private property for public use without just compensation.

¹ *Munn v. Illinois*, 94 U. S. 113 (1876) and the *Granger Cases*, 94 U. S. 155, 164, 179, 180. See Buck, *The Granger Movement*, chaps. 4-6. For similar decisions approving the regulative power of the states see *Bradwell v. The State*, 16 Wall. 130 (1872); *Bartemeyer v. Iowa*, 18 Wall. 129 (1873); *United States v. Cruikshank*, 92 U. S. 542 (1875); *Hurtado v. California*, 110 U. S. 516 (1883); *Barbier v. Connolly*, 113 U. S. 27 (1884); and *Powell v. Pennsylvania*, 127 U. S. 678 (1887). See, however, Justice Field's opinion on the broad implications of the Fourteenth Amendment, 113 U. S. 31.

² *Munn v. Illinois*, 94 U. S. 133, 134. At common law, in the absence of legislation, a public utility was bound to charge no more than a reasonable rate and in case of complaint it was for a court to decide whether the rate was reasonable. But if Parliament fixed a schedule of rates no court could inquire into the question of reasonableness. The remedy in such case lay in an appeal to Parliament or to the voters, not to the courts. Gerard C. Henderson, "Railway Valuation and the Courts," *Harv. Law Rev.*, XXXIII (May, 1920), 904.

³ 94 U. S. 134.

sive of the rights of private property, heretofore believed to be protected by constitutional guarantees against legislative interference.”¹

Thus far the federal courts had refused to limit the power of taxation by an implied public purpose doctrine or by the due process of law clause, to restrict the legislative regulation of private callings, even to the extent of permitting the creation of an exclusive monopoly, or to prevent the fixing, without judicial recourse, of the maximum charge for the use of property affected with a public interest.²

2. *Economic and Political Pressure brings about a Change in Supreme Court Decisions.* But the conservative policies which had grown into favor and had met with judicial approval in the states, were reflected in a reversal of the position of the Supreme Court, which gradually made the minority views in the *Slaughter-House* and the *Granger Cases* the majority opinion of the court. The persistent appeal to the court by counsel, representing interests desiring protection under the Fourteenth Amendment and under other clauses of the Constitution, ultimately had the desired result.³ Some marked

¹ *Ibid.*, 136. In *Stone v. Wisconsin*, it was again maintained by the minority that the court's decision that a corporation charter was subject to alterations or repeal by the state legislature was wrong, and that it will "justify the legislature in fixing the prices of all articles and the compensation for all services. It sanctions intermeddling with all business and pursuits and property in the community, leaving the use and enjoyment of property to be regulated according to the discretion of the legislature." 94 U. S. 181, 186 (1876).

² The decisions in the *Granger Cases* Judge Hough remarks "seemed to put all complaints of corporate regulation of service and charges out of court, if an appeal under the due-process clause was ventured against a state; the still continuing dissents of Justice Field seemed most unorthodox. The remarks in another judgment, that due process was usually what the state ordained, seemed to clinch the matter." *Harv. Law Rev.*, XXXII, 226 and *Walker v. Sauvinet*, 92 U. S. 90 (1875).

³ See argument of Joseph H. Choate in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 532, 534 (1895): "I believe there are private rights of property here to be protected; that we have a right to come to this court and ask for this protection, and that this court has a right, without asking leave of the attorney general or any counsel, to hear our plea. The act of Congress which we are inpuing before you is communistic in its purpose and tendencies and is defended here upon principles as communistic, socialistic — what shall I call them — populist as ever have been addressed to any political assembly in this world. . . . I have thought that

changes in economic and social conditions, and political developments arising therefrom, prepared the way for a change of opinion on the meaning of the vague phrases of the Fourteenth Amendment.

The Civil War brought on something in the nature of an industrial revolution in the United States. When foreign intercourse was almost entirely cut off, the growth of domestic industries was greatly increased. The movement once begun, and encouraged by a high protective tariff, a phenomenal growth of manufactures took place from 1870 to 1900. The opening up of extensive areas in the West, begun before the issues of the Civil War overshadowed everything else, was accelerated by the Homestead Act and by the building of transcontinental railways through lavish grants of land by state and federal governments, and through generous financial aid in other ways. The wave of commercial expansion that followed the war, augmented by high protective duties, offered rare opportunities for masters of finance and captains of industry, which were taken advantage of in the consolidation of the railways into great systems, and often in wrecking their finances by outrageous manipulations, and in the beginnings of concentration and integration of small units in the field of manufactures. As the capitalists grew in number, and their interests increased in importance, they sought not only to control legislative assemblies in order to secure special favors but also, in certain other respects, to curtail their activities.¹

At the same time that such a marked commercial expansion was under way and the process of consolidation and integration was going on, certain movements originating

one of the fundamental objects of all civilized governments was the preservation of the rights of private property. I have thought it was the very keystone in the arch upon which all civilized government rests and that this once abandoned, everything was at stake and in danger."

¹ S. J. Buck, *The Granger Movement* (Cambridge, 1913), pp. 13 ff.

mostly in the West and the South aimed to check this development, and to bring many of the business practices involved under regulation by law. The early eighties saw "everywhere increasing inclination to translate social yearnings into statutes that interfered with the also fast-increasing class who wished to be let alone because they were well able to take care of themselves under a static common law."¹ The Granger Movement, populism, and the beginning of the regulation of industry on behalf of labor, gave what seemed to many ominous warnings of a dangerous trend toward state socialism. Thus there arose a clearly drawn controversy between the leaders of industry, commerce, and finance, and the forces favoring public regulation and control.

The rush of immigration to the West and the commercial enterprises involved in opening up large sections of new land, gave to the frontier and to the philosophy accompanying frontier conditions a dominance in American public life. Large corporations and industrial enterprises, amply able to take care of themselves, began to advocate a policy of hands off by the government, and this policy accorded well with the interests of those who were pushing the frontier farther to the West. A combination of conservative leaders in both leading parties was organized to contest all forms of regulation of business interests by the public. As Hamilton and Madison thought when the federal Constitution was being formed, that it was necessary to take steps to check the activities of "overbearing majorities," so Judge Dillon expressed the opinion of a dominant class in the latter part of the nineteenth century when he said, "We cannot fail to see that what is now to be feared and guarded against is the despotism of the many — of the majority."² A solid front faced the seemingly radical regulative tendencies growing in the South

¹ Hough, *op. cit.* p. 227.

² *The Laws and Jurisprudence of England and America*, pp. 204-205.

and the West. The line was clearly drawn between the conservatives, combined now with the augmented followers of the *laissez faire* policy, and the radical leaders of the movement favoring public regulation of public service enterprises and legislative control of industrial conditions, regarded as harmful both to the laborers and to the general public. Justice Holmes had in mind this controversy when he referred to conditions which

led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right. I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantages on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.¹

It was the drawing of a well-defined issue between conservative and, at times, reactionary forces which now opposed public regulation of business interests, public and private, and the liberal or radical leaders who were committed to regulative and restrictive policies that finally brought pressure to bear on the Supreme Court sufficient to secure a reversal of its interpretation of the Fourteenth Amendment.²

¹ *Collected Legal Papers* (New York, 1920), p. 184 and *Harv. Law Rev.*, X (March, 1897), 456, 467.

² "Conservative and liberal schools of interpretation not only instantly appeared at bar, but in the court, and along party lines, in a way not usually recognized." Hough, *op. cit.*, p. 225. "The Granger legislation aroused bitter political passions and grave fears among those who believed the welfare of the country depended upon the security of property. In case after case, as it came before the Supreme Court, the leaders of the bar appealed to the court not to leave the vast interests of private stockholders at the mercy of radical state legislatures. To have withstood this appeal would have been utterly inconsistent with the individualistic spirit which pervaded American jurisprudence in the latter part of the nineteenth century. Some method must be devised by which courts could check the assaults of western legislatures upon established property rights." Henderson, *op. cit.*, p. 905. See also Hough, *op. cit.*, p. 227.

Speaking of the growth of litigation under due process of law as the product of two generations, Justice Hough remarks: "To me the reasons seem to have no very close relation to the law or its professors; but to rest on the social and material changes which have within the years indicated transformed this country from an agricultural to a manufacturing community, and its population so largely from rural to urban."¹

Reference was made previously to an apparent change of position when Justice Miller defended the public purpose criterion in taxation as the basis for well-defined implied limits on state legislatures. The conclusion was reached that there can be no lawful tax which is not levied for a public purpose, and that the determination of what is a public purpose is ultimately for the courts.² That the majority of the court was changing the grounds on which judicial review of legislation was formerly exercised was asserted in a dissent by Justice Clifford.³ The Supreme Court, however, was not

¹ Hough, *op. cit.*, p. 222.

² *Loan Association v. Topeka*, 20 Wall. 655, 662, 663 (1874). See comment of Justice Miller in *Davidson v. New Orleans*, "that because of the fact that the *Loan Association Case* came to the federal courts because of the character of the parties, the justices felt free to enforce general principles of constitutional law." 96 U. S. 97, 105 (1877).

When the contention was made that unjust and oppressive taxation by the states should be prevented, the Supreme Court held that the Constitution was not intended to furnish a corrective for every abuse of power which may be committed by the state governments and could not afford relief between a state and its citizens against taxation, however unjust, oppressive, or onerous. *Kirtland v. Hotchkiss*, 100 U. S. 491, 498 (1879). But eleven years later, speaking again through Justice Harlan, an unwise exercise of the power of levying special assessments was held invalid on the general ground that "the power of the legislature in these matters is not unlimited." *Norwood v. Baker*, 172 U. S. 268, 278 (1898). For a modification of the judgment in this case see *French v. Barber Asphalt Pav. Co.*, 181 U. S. 324 (1901). Justices Harlan, White, and McKenna dissented.

³ "Courts cannot nullify an act of the state legislature," said Justice Clifford, "on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instrument disclose any such restriction. Such a power is denied to the courts, because to concede it would be to make the courts sovereign over both the Constitution and the people, and convert the government into a judicial despotism. . . . Unwise laws and such as are highly inexpedient and unjust are frequently passed by

as yet inclined to accept, as a general limitation applicable to the taxing power of the federal and state governments, the public purpose doctrine of Justices Cooley and Dillon with all of its implications.

3. *Reversal of the Former Opinions on the Meaning of Due Process of Law.* A change of opinion relative to the meaning of the due process of law clause of the Fourteenth Amendment, which has extended its scope into many phases of federal and state law, was indicated primarily in cases relating to the state regulation of public utilities, in those involving the concept of the liberty of contract or liberty of calling, and in the interpretation of due process of law into a broad rule of reason to test the validity of many controversial state enactments.

a. *Due Process of Law applied to the Procedure in the Regulation of Public Utilities.* Signs of the changing attitude of the justices of the Supreme Court relative to the legislative control over public utilities appeared when Chief Justice Waite in upholding the right of legislatures to regulate railway charges said:

It is not to be inferred that this power of limitation or regulation by the state is itself without limit. This power to regulate is not the power to destroy, and limitation is not the equivalent of confiscation . . . the state cannot . . . do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.¹

the legislative bodies, but there is no power vested in a circuit court, nor in this court to determine that any law passed by a state legislature is void if it is not repugnant to their own constitution nor the Constitution of the United States." 20 Wall. 669, 670.

¹ *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307, 331 (1885). "It is now settled in this court," said the Chief Justice, "that a state has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." *Ibid.*, 325. Justices Harlan and Field dissented on the ground that the state act was void in so far as it authorized a commission rather than a court to determine finally the fair return on the value of a railroad. For a similar suggestion see *Spring Valley Water Works v. Schottler*, 110 U. S. 347, 354 (1883). See opinion of

Justice Gray, who joined with the majority in the *Munn Case*, had changed his opinion in a decade sufficiently to approve Waite's dictum "as a general rule of law," but doubted whether the court would, under any circumstances, have the power to hold a state rate act void on the ground that it was unreasonable.¹ And as late as 1892 the court again expressed doubt whether it could hold that a rate fixed by the legislature was unreasonable.²

But the doubt and uncertainty prevailing for some time was in a large part removed when in the epoch-making *Minnesota Rate Case* the Supreme Court held that rate regulation, although primarily legislative in character, was subject to judicial review under the due process of law clause. Declaring invalid the Minnesota Act of 1887, providing that the rates established by a railroad and warehouse commission shall be final and conclusive as to what are equal and reasonable charges, and that there could be no judicial inquiry on the question of reasonableness, Justice Blatchford, extending Chief Justice Waite's dictum, said:

The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.³

Justice Harlan in *Ruggles v. Illinois*, 108 U. S. 526, 535 (1883) for an effort to place the basis for the judicial review of rate regulation on the contract clause and on the principles announced by Chief Justice Marshall in the *Dartmouth College Case*. Using this decision as a basis the railroads denied the right of the states or of the nation to regulate them. Buck, *The Granger Movement*, p. 12.

¹ *Dow v. Beidleman*, 125 U. S. 680, 686, 691 (1888). A state law in this case which fixed a maximum of three cents a mile for a railway charge for carrying passengers was held not to deny these corporations due process of law. Justice Gray, who joined the dissenters in *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418 (1890), had shifted his position completely and was with the majority in *Smyth v. Ames*, 169 U. S. 466 (1898).

² *Budd v. New York*, 143 U. S. 517, 548 (1892); cf. Henderson, *op. cit.*, pp. 904 ff.

³ *Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418, 458 (1889); through the opinions of Justice Brewer in *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 397 (1894) and of Justice Harlan in *Smyth v. Ames*, 169 U. S. 466,

Justice Bradley, with whom concurred Justices Gray and Lamar, asserted that the majority opinion of the court practically overruled *Munn v. Illinois* and other railroad cases decided by the court, and commented as follows:

But it is said that all charges should be reasonable, and that none but reasonable charges should be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is preëminently a legislative one, involving considerations of policy as well as of remuneration; and is usually determined by the legislature by fixing a maximum of charges. . . . If this maximum is not exceeded, the courts cannot interfere. . . . Thus, the legislature either fixes the charges at rates which it deems reasonable; or merely declares that they shall be reasonable; and it is only in the latter case, where reasonableness is left open, that the courts have jurisdiction of the subject.¹

A decision which made the courts the final arbiters in the regulation of rates, Justice Bradley thought, was an assumption of an authority on the part of the judiciary which it had no right to make. To the repeated arguments that such a power in the hands of legislatures was dangerous and that implied limits on legislatures were essential to preserve and

523 ff. (1898), the change in position was completed. Under the Fourteenth Amendment it has since been repeatedly held that "the rates must be sufficient to cover reasonable operating expenses, plus a proper allowance for depreciation, plus a fair return upon the value of the property; in short, there must be a reasonable judgment having its basis in the proper consideration of all relevant facts." R. L. Hale, "Rate Making and the Revision of the Property Concept," *Columbia Law Review* XXII (March, 1922), 209.

For the opinions of Justice Brewer as Circuit Justice supporting an extensive judicial review to protect the vested rights of utility corporations, see *Ames v. Union Pac. Ry. Co.*, 64 Fed. 165, 176 (1894) and *National Waterworks Co. v. Kansas City*, 62 Fed. 853, 864 ff. (1894). See also Justice Brewer's opinion holding invalid an act of Congress which abolished the tolls charged by a private company on river traffic with an express provision that the value of the franchise was not to be included in the condemnation proceedings. A franchise, he said, "is a vested right. The state has power to grant it. It may retake it, as it may other private property, for public use, upon the payment of just compensation . . . but it can no more take the franchise which the state has given than it can any private property belonging to the individual." *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 341 (1893).

¹ 134 U. S. 418, 462 (1889).

protect property rights, Justice Bradley replied, defending the principles of democratic control of public affairs:

It may be that our legislatures are invested with too much power, open, as they are, to influences so dangerous to the interests of individuals, corporations and society. But such is the constitution of our republican form of government; and we are bound to abide by it until it can be corrected in a legitimate way. If our legislatures become too arbitrary in the exercise of their powers, the people always have a remedy in their hands; they may at any time restrain them by constitutional limitations. But so long as they remain invested with the powers, that ordinarily belong to the legislative branch of government they are entitled to exercise those powers, amongst which, in my judgment, is that of the regulation of railroads and other public means of intercommunication, and the burdens and charges which those who own them are authorized to impose upon the public.¹

The original purpose of the due process of law clause was to protect the weak and the oppressed but when the Supreme Court decided that corporations were entitled to the protection of the Fourteenth Amendment and that foreign corporations could not be deprived of their property arbitrarily,² the way was opened for organizations of capital to contest before the Supreme Court such laws as they regarded unwise or detrimental to their interests. Comparatively few cases

¹ 134 U. S., 466.

² Cf. Opinion of Justice Field in the Santa Clara Railroad Tax Case, 9 Sawyer 165, 210, and of Justice Harlan in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U. S. 394 (1886); also Justice Field in *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 188 (1888) and *Minneapolis and St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26, 28 (1889). Also Henderson, *The Position of Foreign Corporations in American Constitutional Law*, chap. 9. That a foreign corporation was entitled to the equal protection of the laws was held, also, in *Pembina Mining Case*, *infra*, and *Southern Railway Co. v. Greene*, 216 U. S. 400, 412 (1910).

Mr. Smith claims by rendering the inhibitions of the Fourteenth Amendment applicable to corporations the Constitution of the United States was amended "by the act of the judiciary alone." "We approach now," he asserted, "a Revolution in our form of government accomplished by the Supreme Court of the United States, so startling that it seems almost incredible, and this Revolution was completed so silently that it has passed almost unnoticed even by the careful historians of the Constitution and of the Court." F. Dumont Smith, "Decisive Battles of Constitutional Law," *American Bar Association Journal*, X (July, 1924), 505, and *The Constitution: Its Story and Battles* (Los Angeles, 1926), p. 359.

have arisen under the amendment to protect personal or individual rights and instead it has become the bulwark for the protection of the privileges and interests of large corporations. Where states reserved in their constitutions the right of the legislature to alter, amend, or repeal at will corporate franchises, the Supreme Court intervened to insist that the power of alteration and amendment is not without limit. The alterations must be reasonable and they must not take the property of the company without just compensation.¹ Such a holding has amounted to the practical proposition that legislatures may amend corporate charters to the advantage of the incorporators but not to their detriment.

As a result of this change in the attitude of the court, and the extension of due process of law as a standard applicable to rate regulation and the reasonableness of measures for public control, a large field of public powers, namely, the manifold regulations of state legislatures and administrative commissions, in their effort to control public utilities, has become subject to the continuous critical scrutiny of the courts,² often primarily concerned with preserving the property rights of the utilities.

¹ Justice Swayne in *Shields v. Ohio*, 95 U. S. 319, 325 (1877).

² For about thirty years "we have had every species of state action productive of permanent loss to vested rights, or limiting business liberty, put to the acid test of due process in the Supreme Court." Hough, *op. cit.*, p. 229. The decisions as to public utility rates and regulations are regarded as "extraordinary in the extent of the power which they place in the hands of the courts, and in the way in which they tie the hands of the state legislatures in respect to subjects over which it has always been considered they had absolute control . . . the will of the people in this, as in other respects, is expressed through the acts of their representatives in the legislature. The opinion that the reasonableness of an act is not a legislative but a judicial question substitutes the will of the judges for the will of the people. Mr. Justice Bradley clearly foresaw this, and deeply regretted the inevitable conflict between the courts and the legislature." "The Judicial Record of Justice Bradley," William Draper Lewis in *The Miscellaneous Writings of Joseph P. Bradley* (1902), p. 25. "After the Chicago Case," says Justice Hough, "legislators were arraigned before the bar and courts passed judgment not, mark you, on the justice or wisdom, but on the reason, of what they had done." *Harv. Law Rev.*, XXXII, 228. For an analysis of the shifting of Supreme Court justices in defining the terms

Judicial review by this extension of the application of due process of law has entered a new field, and has placed numerous restrictions and obstructions in the way of effective regulation of public utilities by states and other local bodies. Such review manifestly was not inherent in any constitutional provision or a necessary concomitant of constitutional interpretation as first understood and applied in state and federal governments. It came as a result of the fear of democratic control and of popular participation in the regulation of public utilities and of the belief that private property could be made safe only with extensive limitations on legislatures rendered effective by courts through judicial review of legislative and administrative findings.

While the court was gradually changing its position on the review of legislative and administrative procedure in rate-making and in the regulative power exercised by states over corporations and public utilities, members of the court imbued with the frontier philosophy of individualism, or sympathetic with conservative doctrines were establishing a standard by construction to pass on the fairness or expediency of labor legislation. Justice Field had suggested in the *Slaughter-House Cases* that in his opinion the Fourteenth Amendment was intended to protect all citizens of the United States in their "common rights," and it was in the definition of these "common rights" that the theories of the Declaration of Independence and of the eighteenth-century natural rights were again applied.¹

"liberty" and "property" from the standpoint of an economist, consult John R. Commons, *Legal Foundations of Capitalism* (New York, 1924), especially chap. 9.

For review of the decisions of public utility commissions by the federal courts in order to make sure that the decisions are "fair" and "reasonable," consult John Dickinson, *Administrative Justice and the Supremacy of the Law in the United States* (Cambridge, 1927), chap. 6.

¹ Justice Field, in holding void a personal judgment rendered by a state court in an action *in personam* against a non-resident upon whom no personal service was made, defined due process of law so as to include a portion of the concept of natural law: "They then mean a course of legal proceedings according to those rules and

(b) *Due Process of Law and Liberty of Contract*. As an advocate of the natural rights ideas of the revolutionary period Justice Field became the mouthpiece for the judicial protection of the fundamental rights which belong to man "as a free man and a free citizen."¹ At the first available opportunities Justice Field gave a careful exposition of his views as to the nature of these fundamental rights, as follows:

As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people; "We hold these truths to be self-evident" — that is, so plain that their truth is recognized upon their mere statement — "that all men are endowed" — not by edicts of Emperors, or decrees of Parliament, or acts of Congress, but "by their Creator with certain inalienable rights" — that is, rights which cannot be bartered away or given away, or taken away except in punishment of crime — "and that among these, are life, liberty, and the pursuit of happiness, and to secure these" — not grant them, but secure them — "governments are instituted among men, deriving their just powers from the consent of the governed."

Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment.

principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution — that is, by the law of its creation: to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its protection by service of process within the state, or his voluntary appearance." *Pennoyer v. Neff*, 95 U. S. 714, 733 (1877). For an approval of this interpretation, see opinion of Justice Gray in *Scott v. McNeal*, 154 U. S. 34, 46 (1894).

¹ See dissent in *Slaughter-House Cases*, 16 Wall. 36, 95 (1872); also opinion of Justice Brewer in *Monongahela Navigation Co. v. United States*, 148 U. S. 312, 324 (1892). Justice Brewer regarded the Declaration of Independence as the cornerstone of the federal Constitution. Cf. address, Yale Law School, June, 1891, on "Protection to Private Property from Public Attack."

The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves, and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.

It has been well said that "the property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hand, and to hinder his employing his strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper." Adam Smith's *Wealth of Nations*, Bk. I, chap. 10.¹

The Fourteenth Amendment, in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.²

¹ *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 756 (1883). This opinion, though it was not in accord with the majority views of the Supreme Court, had an extensive influence on the state courts—"It produced a reactionary line of decisions in New York on liberty to pursue one's calling, and through these cases its echoes are still ringing in the books." Pound, "Liberty of Contract," *Yale Law Journal*, XVIII (May, 1909), 454, 470.

² *Barbier v. Connolly*, 113 U. S. 27, 31 (1885).

These dicta, along with some similar remarks of other justices, introduced into American law the concept of liberty of contract and of calling. This concept, which is one of the by-products of natural law thinking, had its origin in mediæval times and was accepted in France and in England as one of the principles of the economic policy of *laissez faire*. The principle was accepted and applied by the state courts to check the increased efforts of legislatures to regulate wage contracts and labor conditions.¹

It was merely necessary to translate these dicta into concrete terms and to use them in rendering the judgments of the Supreme Court.² This was done by Justice Peckham

¹ Cf. the recognition of liberty of contract as an inalienable right of a citizen by Justice Brewer in *Frisbie v. United States*, 157 U. S. 160, 165 (1894). The main guaranty of private rights against unjust legislation is found in the due process clause, according to Justice Andrews. As protected under this clause Justice Andrews thought "the right to life includes the right of the individual to his body . . . the right to liberty, the right to exercise his faculties and to follow a lawful avocation for the support of life; the right of property, the right to acquire power and enjoy it in any way consistent with the equal rights of others and the just exactions and demands of the state." *Bertholf v. O'Reilly*, 74 N. Y. 509, 515 (1878). See also *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354 (1886); *Millett v. People*, 117 Ill. 294, 7 N. E. 631 (1886); *Braceville Coal Co. v. People*, 147 Ill. 66, 35, N. E. 62 (1893); *State v. Loomis*, 115 Mo. 307, 22 S. W. 350 (1892); *State v. Norton*, 5 Ohio N. P. R. 183 (1898); *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 863 (1889); *in re House Bill*, 21 Col. Rep. 27 (1895); *Ritchie v. People*, 155 Ill. 98, 104 ff. (1895); and *People v. Williams*, 189 N. Y. 131 (1907).

For summary of decisions developing the doctrine of liberty of contract from 1890-99, cf. Pound, "Liberty of Contract," *Yale Law Jour.*, XXIII, 472 ff. and G. G. Groat, "Economic Wage and Legal Wage," *Ibid.*, XXXIII (March, 1924), 488, 494. The application of this concept by the Supreme Court in invalidating a Minimum Wage Act for the District of Columbia, in *Adkins v. Children's Hospital*, 261 U. S. 525 (1923), will be considered later. According to Louis D. Brandeis, "Courts continued to ignore newly arisen needs. They have applied complacently eighteenth century conceptions of liberty of the individual and of the sacredness of private property . . . where statutes giving expression to the new social spirit were clearly constitutional, judges, imbued with the relentless spirit of individualism, often construed them away." *Illinois Law Review*, X (February, 1916), 461, 464. Though some of the illiberal decisions relating to labor contracts have been reversed, the liberty of contract doctrine still stands as a bar to progressive measures in the field of labor legislation. Cf. *Ritchie v. Wayman*, 244 Ill. 509 (1910) and *People v. Charles Schweinler Press*, 214 N. Y. 395 (1915).

² The concept of liberty of contract which was formulated by Justice Field, and developed in a series of state decisions, was thus defined by Justice Shope in the *Braceville Coal Company* case: "The fundamental principle upon which liberty is

when he asserted that, "in the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto,"¹ and with extensions beyond Field's broad terms, by Justices Harlan² and Pitney.³

Thus, beginning in a series of dicta, a doctrine of liberty of contract was developed as a phase of the Fourteenth Amendment and was gradually accepted and interpreted by the majority of the Supreme Court to embody the natural and inalienable rights doctrine of the Declaration of Independence. The terms of the Fifth and Fourteenth Amendments were thereby given an interpretation which placed new limits on legislative powers for the state and federal

based, in free and enlightened government, is equality under the law of the land. It has accordingly been everywhere held, that liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but, indeed, to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. 147 Ill. 66, 71 (1893). In most cases the language of Justice Field was used, with variations to suit the circumstances of the case.

¹ *Allgeyer v. Louisiana*, 165 U. S. 578, 591 (1897).

² "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. So the right of the employé to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason to dispense with the services of such employé. It was the legal right of the defendant, Adair, — however unwise such a course might have been, — to discharge Coppage because of his being a member of a labor organization, as it was the legal right of Coppage, if he saw fit to do so, — however unwise such a course on his part might have been, — to quit the service in which he was engaged, because the defendant employed some persons who were not members of a labor organization. In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." *Adair v. United States*, 208 U. S. 161, 174-175 (1908).

³ "Included in the right of personal liberty and the right of private property — partaking of the nature of each — is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money." *Coppage v. Kansas*, 236 U. S. 1, 14 (1915).

governments.¹ Advocates of the "new liberties" soon formulated what they called a fundamental principle, namely, that the term "liberty" as used in the Declaration of Independence and as extracted from the general language "due process of law" in written constitutions meant not only for the individual freedom from servitude and restraint, but also freedom to use his powers and faculties, and to pursue such vocation or calling as he may choose, subject only to the restraints necessary to protect the common welfare.²

The adoption by the courts of the principle of judicial review of public utility regulations as a requirement for the due process clause of the Fourteenth Amendment, combined with an incorporation therewith of a considerable part of Chancellor Kent's vested rights doctrine,³ which the judiciary were specially charged to apply, and the interpretation of the amendment to include the natural rights theories of the Declaration of Independence went a long way toward construing the Fourteenth Amendment as radical Republican leaders had desired, so as to exercise national supervision over the control of civil rights — an interpretation which

¹ Commenting on the fact that the due process clauses of the Fifth and Fourteenth Amendments were rarely invoked as an aid to protect private rights or referred to by justices prior to 1880, Mr. Willis says: "Finally, with the case of *Davidson v. New Orleans*, 96 U. S. 97 (1878), and a long line of cases following it, Coke's doctrine of a supreme fundamental law was merged in the doctrine of due process of law, and legislation has since then been set aside because not due process of law but not because in violation of some supreme fundamental law." Hugh Evander Willis, "Due Process of Law under the United States Constitution," *University of Pennsylvania Law Review*, LXXIV (February, 1926), 331, 335.

² In considering the application of a woman to practice law, Justice Hackney claimed: "There is a law higher in this country, and one better suited to the rights and liberties of the American citizens, the natural right to gain a livelihood by intelligence, honesty and industry in the arts, the sciences, the professions, or other vocations" and the exclusion from such practice was held to interfere with inalienable rights, citing Justice Field in *Cummings v. Missouri*, 4 Wallace 277, 321. *In re Leach*, 134 Ind. 665, 668 (1893).

³ In 1896 and 1897 it was held that due process of law was a limitation on the power of eminent domain. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 113 (1896); *Chicago, Burlington and Quincy Ry. Co. v. Chicago*, 166 U. S. 226 (1896).

the court itself had repeatedly rejected.¹ But with all of these ideas combined in the due process clause a mere beginning was made to develop in the constitutional law of the United States a formidable *Naturrecht* or natural law, which was to be fostered into a new lease of life by combining the phrases "due process of law" and the "equal protection of the laws." These have been united to assure the broadest kind of protection for the fundamental rights of the individual and for the assurance that there can be no arbitrary interference with personal liberty. Thereby a theory of the protection of human rights glorified by the common law courts was consecrated into a constitutional doctrine and characterized as democratic.

¹ Instead of the judges having discovered new meanings for due process of law, Dr. Mott claims they have merely appropriated portions of a general residual meaning. Mott, *Due Process of Law*, p. 590. From this viewpoint an unappropriated portion of this concept will always be available to keep legislators in the straight and narrow paths which judges lay out.

CHAPTER VII

THE DEVELOPMENT OF A GENERAL RULE OF REASON TO DETERMINE THE VALIDITY OF LEGISLATIVE ACTS

TO GIVE due process of law a more effective scope as a criterion to measure the validity of new legislative projects, the justices who were exponents of conservative principles and *laissez faire* policies adopted the dicta of a few authorities on Magna Carta and of several state justices that this phrase was designed to prevent all governmental acts arbitrary in their nature and to preserve the fundamental principles of a free republican government. The application of *a rule of reason* or *a rule of expediency* as a primary standard to evaluate the propriety of legislation was accomplished by making due process of law an inhibition against arbitrary legislative or administrative acts, against any interference with the fundamental rights of the individual, and against social and economic legislation which was regarded unreasonable or discriminatory.

1. *Arbitrary Legislative and Administrative Acts are Void.* Locke is credited with suggesting the idea that exercising governmental powers in an arbitrary manner is unconstitutional.¹ The suggestion of this idea, however, may be traced to opinions rather common in ancient and mediaeval times. The claims that certain clauses of Magna Carta were intended to check all forms of arbitrary political authority,² had few supporters in England, as we have seen, but was

¹ See F. W. Maitland, "An Historical Sketch of Liberty and Equality" in *Collected Papers* (ed. by H. A. L. Fisher, Cambridge, 1911), I, 80, 83.

² Cf. Mott, *Due Process of Law*, chaps. 3 and 4.

repudiated by all parties prior to the time that the American colonies set up new governments.

Early in the nineteenth century the belief had been expressed in the United States that the law of the land provision was intended to remove arbitrary power from every branch of the government.¹ One justice declared that "the framers of the constitution never dreamed of permitting the exercise of arbitrary power in any department of government."² The suggestion that due process of law was intended to secure the individual from the arbitrary exercise of the powers of government³ and that the security of a citizen against arbitrary legislation rested upon the broader and more solid ground of natural rights, and was not wholly dependent on those negatives upon the legislative power contained in the constitution,⁴ gave an indication of possible future interpretations of due process of law. But there were few occasions to consider these comments or to apply them concretely⁵ until a similar doctrine was adopted by the Supreme Court of the United States, and made a part of the

¹ For use of the terms "arbitrary" or "unreasonable" in passing on the validity of legislative acts in the United States, consult Robert P. Reeder, "Is Unreasonable Legislation Unconstitutional?" *University of Pennsylvania Law Review*, LXII (January, 1914), 191.

² See comments of Attorney General Haywood in *State v. ————* 29, 30 (N. C., 1794) and of Justice Peck in *State v. Cooper*, 2 Yerg. (Tenn., 1831) 599, 611. The law of the land provision, Justice Nott thought, was intended "in some way or other, to operate as a check upon the exercise of arbitrary power." *Dunn v. City Council of Charleston*, Harper's Law Reports. 189, 199 (1824). Chief Justice Gibson in *Norman v. Heist*, 5 W. & S. (Pa., 1843) 171, 173 claimed that the design of the convention which framed the state constitution was to exclude arbitrary power from every branch of the government. The exercise of a governmental power which is arbitrary is void, according to Justice Campbell, dissenting in *Sears v. Cottrell*, 5 Mich. 251, 281 (1858).

³ Justice Johnson in *Bank of Columbia v. Okely*, 4 Wheat. 234, 244 (1819). This dictum of Justice Johnson was cited and approved by Justice Gray in *Scott v. McNeal* in denying to a state court the right to sell property for the payment of debts without notice to a party absent from the state for seven years. 154 U. S. 34, 45 (1893).

⁴ Justice Mason in *White v. White*, 5 Barb. 474, 484 (1849).

⁵ See, however, Chief Justice Hines in *Barbour v. Louisville Board of Trade*, 82 Ky. 645, 648 (1885).

due process clause of the Fourteenth Amendment. Justices Bradley and Field were among the first to suggest the notion that the Fourteenth Amendment was intended to be an inhibition against arbitrary legislative and administrative acts.¹ They pleaded for an extensive application of the requirement of due process of law to all state acts, and suggested that if such acts were "arbitrary, oppressive, and unjust," they might be declared not to be in accord with due process of law.²

When judges insisted that "under our institutions, arbitrary power over another's lawful pursuits is not vested in any man nor in any tribunal,"³ due process of law, applied in England only as a guard against executive usurpation, was destined to become in the United States a bulwark against arbitrary legislation.⁴ This new standard for legislative acts was applied when it was determined that the validity of statutes was not to be tested in the federal courts unless "they are clearly inconsistent with some power granted to the general

¹ "The principal, if not the sole, purpose of its [the Fourteenth Amendment] prohibitions is to prevent any arbitrary invasion by state authority of the rights of persons and property." Justice Field, dissenting in *Butchers' Union v. Crescent City Co.*, 111 U. S. 746, 759 (1883).

² Justice Bradley, concurring in *Davidson v. New Orleans*, 96 U. S. 97, 107 (1877).

³ Justice Field in *ex parte Wall*, 107 U. S. 265, 303 (1882). And again, he asserted, the Fourteenth Amendment undoubtedly intended that there should be "no arbitrary deprivation of life or liberty, or arbitrary spoliation of property," and that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights. *Barbier v. Connolly*, 113 U. S. 27, 31 (1885). Cf. also *Stuart v. Palmer*, 74 N. Y. 183, 190 (1878), in which a New York justice regarded the due process clause as a limitation upon the arbitrary exercise of legislative powers. "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." Justice Brown in *Lawton v. Steele*, 152 U. S. 133, 137 (1894).

⁴ *Hurtado v. California*, 110 U. S. 516, 532 (1884). Beginning with *Davidson v. New Orleans*, 96 U. S. 97 (1878), Mr. Willis asserts, Coke's doctrine of a fundamental law superior to all legislation was made a part of due process of law. Hugh Evander Willis, "Due Process of Law under the United States Constitution," *Univ. of Pa. Law Rev.*, LXXIV (February, 1926), 331, 335. For applications of the new interpretation see *Chicago, Milwaukee and St. Paul Ry. Co. v. Minnesota*, 134 U. S. 418 (1890); *Allgeyer v. Louisiana*, 165 U. S. 578 (1897); and *Lochner v. New York*, 198 U. S. 45 (1905).

government or with some right secured by that instrument or unless they are purely arbitrary in their nature.”¹

The phrase “equal protection of the laws,” though not in the Fifth Amendment of the federal Constitution, and not, as a rule, in the state constitutions, had been interpreted as a requirement for legislative and executive acts by certain justices in state and federal courts prior to 1879.² It was used without any clear indication as to the purpose of the phrase in the draft of the Fourteenth Amendment which was finally adopted, and the courts were loath to apply its vague content to concrete cases until there was a determined effort on the part of certain justices to incorporate the natural rights philosophy and the doctrine of equality of the Declaration of Independence into the Fourteenth Amendment, in order to condemn acts which the judges regarded as arbitrary or unreasonable.³ The movement to declare void acts judicially construed as arbitrary⁴ found the equal protection clause a supplement to what would otherwise have been construed as a requirement of due process of law. That due process would ultimately have been interpreted as involv-

¹ Justice Harlan in *Chicago, Burlington and Quincy Ry. Co. v. Chicago*, 166 U. S. 226, 234 (1896), and *Chicago, Rock Island & Pac. Ry. Co. v. Arkansas*, 219 U. S. 453, 465 (1910).

² Cf. *Holden v. James*, 11 Mass. 396, 405 (1814) and *supra*, p. 111.

³ Opinions of Justices Field in *Barbier v. Connolly*, 113 U. S. 27, 32 (1885), and Matthews in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 370 (1886). Said Justice Matthews: “When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.” Chief Justice Fuller confirmed the rights of the states to deal with criminals within their borders provided no person or class of persons was denied equal and impartial justice and provided state procedure did not subject “the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.” *Leeper v. Texas*, 139 U. S. 462, 468 (1890).

⁴ The term “arbitrary” is vague enough in its connotations to give the widest latitude for a judicial censorship. It may mean acts not governed by any fixed rules, or which are capricious, unfair, absolute, despotic, tyrannical, or irresponsible. It is obvious that personal and partisan inclinations will have great weight in determining whether legislative enactments come within one of these indefinite categories.

ing the equal protection principle is shown by the fact that statutes regarded as conferring undue favors, class privileges, or discrimination are seldom attacked on the equal protection clause alone, but also as a denial of due process of law.

Due process of law and equal protection of the laws, then, combined were being construed with wide enough scope to prevent all legislative and administrative acts which the justices regarded as arbitrary and, like certain other implied limits on legislatures, the equal protection principle was made an essential part of the concept of due process of law.¹ Hence acts which were not general in their application to a particular class were held not to be in accord with the due process and equal protection phrases of the Fourteenth Amendment.²

"The due process clause requires," said Chief Justice Taft, that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society.³

¹ Upholding a New York law providing for capital punishment by electrocution, Chief Justice Fuller said that the Fourteenth Amendment required that the action of the states be "exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights." *In re Kemmler*, 136 U. S. 436, 448 (1889). See also Justice Moody in *Twining v. New Jersey*, 211 U. S. 78, 100 (1908).

² Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which classification is proposed, and can never be made arbitrarily and without any such basis . . . but arbitrary selection can never be justified by calling it classification." Justice Harlan in *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560 (1902), citing the opinion of Justice Brewer in *Gulf, Colorado and Santa Fé Railway v. Ellis*, 165 U. S. 150, 155, 159 (1896). Cf., also, *Justice Day in Southern Ry. Co. v. Greene*, 216 U. S. 400, 417 (1909). For state cases declaring arbitrary police regulations void, cf. Mott, *op. cit.*, p. 338.

³ *Truax v. Corrigan*, 257 U. S. 312, 332 (1924). Mr. Reeder suggests that the practice of declaring legislative acts void because unreasonable, may be regarded as

And Justice Holmes believes that state acts interfering with liberty should be held valid unless "a rational and fair man" would admit that they necessarily infringe "fundamental principles as they have been understood by the traditions of our people and our law."¹ But where is the rational and fair man, what are the fundamental principles, and how are the traditions of the people to be discovered? Since when has the sole custody of these principles and traditions been assigned to the judges?

The way in which judges made limitations applicable to legislative action is admirably shown in one of Cooley's dicta:

The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void. If the act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred, it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial but a mere arbitrary fiat.²

Those who defend the application of judicial standards for the justness or fairness of legislative action claim that it is the only way that unjust interference, not called for by the public needs, with private property and personal liberty can be effectively prevented. But what are unjust interferences with private property, and do these not depend upon changing times and conditions which may be perceived by legislators as well as by judges? And who shall determine

more nearly related to the old idea of natural justice than to the due process of law provision. *Op. cit.*, p. 200.

¹ Dissenting opinion in *Lochner v. New York*, 198 U. S. 45, 76 (1904).

² Cooley, *Constitutional Limitations* (8th ed., 1927), pp. 356, 357. If no other grounds can be discovered to prohibit legislative action, the people have reserved the power to themselves. Whether an act is or is not arbitrary depends upon the conditions prevailing at the time. Justice Pound in *People v. La Fetra*, 230 N. Y. 429, 444 ff.; 130 N. E. 601 (1921); Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, 413 (1922); and *Emergency Rent Cases — Block v. Hirsch*, 256 U. S. 135 (1921) and *Levy Leasing Co. v. Siegel*, 258 U. S. 242 (1922).

what the public needs demand, the representatives of the people or arbiters who have assumed the rôle of umpires?¹

2. *Acts Contrary to Fundamental Rights are Void.*² Among the ideas which have supplemented other phases of the elastic term "due process of law," in limiting legislative functions, is the doctrine that there are immutable fundamental rights or principles which no governmental authorities may invade.

Notions of natural law and of fundamental natural rights, as we have noted, were among the dominant notions of the leaders of the American Revolution and of the framers of the first written constitutions in the United States. Governments, it was believed, were instituted primarily to preserve these rights. And it was taken for granted that legislative enactments which contravened such rights were void, though ideas as to how to prevent such legislative acts or to assure protection to the people against illegal procedure under them were often indefinite. The assertion by the courts of the right

¹ See Reeder, *op. cit.*, pp. 191, 192, for cases in which the Supreme Court has suggested that action would violate the due process of law provision, if unreasonable or arbitrary, and in which the court has intimated that it will pass on the necessity or desirability of legislative or administrative action.

Referring to the claim that an order of the Interstate Commerce Commission based upon its findings of fact was conclusive, Justice Lamar said: "A finding without evidence is arbitrary and baseless. . . . Such authority, however beneficently exercised in one case could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." *Int. Com. Comm. v. Louisville & Nashville R. R.*, 227 U. S. 88, 91 (1912).

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against *intentional and arbitrary discrimination*." Chief Justice Taft in *Sioux City Bridge v. Dakota County*, 260 U. S. 441, 445 (1922), or state procedure in assessments for local improvements must not be "*palpably arbitrary or a plain abuse*." Justice Holmes in *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55, 58 (1915).

Judgments obtained by fraud or without service are not erroneous and not voidable but "*upon principles of natural justice*, and under the due process clause of the Fourteenth Amendment are absolutely void." Justice Lamar in *Simon v. Southern Ry. Co.*, 236 U. S. 115, 122 (1915). [*Italics by the author.*]

² For an analysis of cases affirming the doctrine of fundamental rights and of the incorporation of this doctrine in the due process of law clause, see Francis W. Bird, "The Evolution of Due Process of Law in the Decisions of the United States Supreme Court," *Columbia Law Review*, XIII (January, 1913), 37A.

to review the constitutionality of legislative acts and to become the special guardians of the written instruments containing assertions of natural rights gave a new turn to the legal applications of the fundamental rights philosophy.

It was in connection with the interpretation of the privileges and immunities guaranteed to the citizens of the several states by the federal Constitution that the doctrine of fundamental rights was early announced. Justice Washington said: "We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature fundamental; which belong, of right, to the citizens of all free governments." Though it was regarded as difficult to enumerate these fundamental privileges a few were suggested, such as the enjoyment of life and of liberty, the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject to such restraints as the government may prescribe for the general good.¹ "Standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and letter of the Constitution of the United States," Justice Story held invalid a state legislative act which attempted to interfere with the vested property rights of a corporation.² The rather common belief in fundamental rights also received his sanction when he called attention to the "fundamental maxims of free government," which required that the rights of personal liberty and private property should be held sacred.³

When the doctrines of the Federalists and of conservative thinkers generally lost ground and were repudiated by all departments of the government, including the judiciary, in

¹ *Corfield v. Coryell*, 4 Wash. C. C. 371, 380-382 (1823), Fed. Cas. No. 3230.

² *Terrett v. Taylor*, 9 Cranch, 43, 51 (1815); see reference to "republican principles" by Justice Chase in *Calder v. Bull*, 3 Dallas, 388 (1798).

³ *Wilkinson v. Leland*, 2 Pet. 627, 657 (1829); for extract from Story's opinion cf. *supra*, p. 94.

favor of popular theories of political control, little was heard for several decades of immutable fundamental rights in state or federal courts.¹

The doctrine was reaffirmed after the Civil War by Justice Chase² and then by Justice Miller, who insisted that there are rights in every free government beyond the control of the state and that there are limitations which grow out of the essential nature of all free governments, "implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."³ All men, thought Justice Field, have certain inalienable rights; among these are life, liberty, and the pursuit of happiness; in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone; and in the protection of these rights are all equal before the law.⁴

¹ Occasional references may, of course, be found to what Daniel Webster, in arguing the *Dartmouth College Case*, called "the great principles of republican liberty and of the social compact," or to the "eternal principles of justice which no government has a right to disregard." Justice Green in *Bank of State v. Cooper*, 2 Yerg. 599, 603 (1831). "There is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact . . . that rises above and restrains and sets bounds to the power of legislation," said Chief Justice Buchanan in *Regents v. Williams*, 9 G. & J. 365, 408 (1838). Cooley thought certain "fundamental rights" when inserted in a constitution operated as a limitation on the legislature without any express provisions. *Constitutional Limitations* (1st ed., 1868), and *People v. Hurlbut*, 24 Mich. 44, 97-98 (1871).

² "There are, undoubtedly, fundamental principles of morality and justice which no legislature is at liberty to disregard." *License Tax Cases*, 5 Wall. 462, 469 (1866).

³ *Loan Association v. Topeka*, 20 Wall. 655, 663 (1874); see also Justice Harlan in *Madisonville T. Co. v. St. Bernard M. Co.*, 196 U. S. 239, 251, 252 (1904); and Justice Brown in *Holden v. Hardy*, 169 U. S. 366, 389 (1898), wherein "certain immutable principles of justice" are declared to "inhere in the very idea of a free government"; and *Benson v. Mayer*, 10 Barb. 223, 245 (1850), in which reference was made to "the great principles of Eternal Justice, which lie at the foundation of all free governments." To Justice Swayne they are the "conservative principles which lie at the foundation of all free government," *St. Louis v. The Ferry Co.*, 11 Wall. 423, 429 (1870); and to the Wisconsin Supreme Court they are "a part of the inherent rights which governments under our conception are established to conserve," *Nunnemacher v. State*, 129 Wis. 190, 197-202 (1907). See also Justice Knowlton in *Commonwealth v. Perry*, 155 Mass. 117, 121 (1891), and Justice Deemer in *State v. Barker*, 116 Ia. 96, 105 (1902).

⁴ *Cummings v. Missouri*, 4 Wall. 277, 321 (1886). The Fourteenth Amendment, according to Justice Field, "was intended to give practical effect to the Declaration

The eighteenth-century notion of fundamental rights beyond the realm of government interference and the concept of inalienable rights as formulated in the Declaration of Independence which, it was thought, governments were designed to protect, have now been incorporated by means of judicial construction as essential elements of due process of law and as necessary principles of the American system of government.¹

of 1776 of inalienable rights which are the gift of the Creator, which the law does not confer, but only recognizes." *Slaughter-House Cases*, 16 Wall. 36, 105 (1872). Agreeing with this opinion, Justice Harlan said that since the adoption of the Fourteenth Amendment, "the privileges and immunities specified in the first ten amendments as belonging to the people of the United States are equally protected by the constitution." Dissent in *Maxwell v. Dow*, 176 U. S. 581, 616 (1899). And again he said, "I go further and hold that the privileges of free speech and of free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding any state to deprive any person of his liberty, without due process of law." *Patterson v. Colorado*, 205 U. S. 454, 456 (1906). Compare this view with the majority opinion of Justice Sanford in *Gitlow v. New York*, 268 U. S. 652 (1925); cf. *infra*, p. 193. Speaking through one of the champions of individualism, the Supreme Court held on another occasion that the Fourteenth Amendment "simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society." Chief Justice Waite in *United States v. Cruikshank*, 92 U. S. 542, 554 (1875); see reference to "immutable principles of liberty and justice" in *Hurtado v. California*, 110 U. S. 516, 535 (1884), also Justice Day in *Watson v. Maryland*, 218 U. S. 173, 177 (1910). For comment as to the way in which the pursuit of the immutable principles of justice in connection with the concept of due process of law leads into the "fields of speculation cultivated by writers on the law of nature and the nebulous natural rights of man," see L. P. McGehee, *Due Process of Law*, pp. 38, 57 ff.

¹ For a summary of citations that the fundamental rights of the citizen are inviolable, cf. Robert P. Reeder, "Constitutional and Extra-Constitutional Restraints," *Univ. of Pa. Law Rev.*, LXI (May, 1913), 441, 452. The emerging concept of liberty of contract was soon to be grouped with the undefined fundamental rights. "No proposition is now more firmly settled," thought Justice Rapallo, "than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit." *People v. Marx*, 99 N. Y. 377, 386 (1885). "There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American states. A statute which violates any of these rights is unconstitutional and void even though the enactment of it is not expressly forbidden. . . . The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of law." *Commonwealth v. Perry*, 155 Mass. 117, 125 (1891). The federal courts can only interfere when fundamental rights guaranteed by the federal Constitution are violated, Justice McKenna in *Ballard v. Hunter*, 204 U. S. 241, 262 (1907); Justice Day in *Rogers v. Peck*, 199 U. S. 425, 434 (1905),

Few lawyers or judges were as frank as Justice Harlan who was among those applying natural law ideas, when he said: "the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the fundamental principles devised for the protection of the essential rights of 'property.'" ¹

Justice Moody was similarly frank when he preferred to rest the decision regarding exemption from self-incrimination on broader ground than the strict language of the Constitution and raised the query, "Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and is of a nature that pertains to process of law, this court has declared it to be essential to due process of law." ²

Despite these apparent applications of principles of reason, or of natural law and natural justice in the opinions of the

and in *Franklin v. South Carolina*, 218 U. S. 161, 164, 165 (1910); "the limit of the full control which the state has in the proceedings of its courts both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the federal Constitution." Justice Peckham in *West v. Louisiana*, 194 U. S. 258, 263 (1904); see also *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 107 (1909). Legislative acts, according to Chief Justice Taft, are not due process which are not in accord with the fundamental principle of equality of application of the law. *Truax v. Corrigan*, 257 U. S. 312, 332 (1921). Judge Dillon thought the value of the due process clause of the Fourteenth Amendment consisted primarily "in the great fundamental principles of right and justice, which it embodies and makes part of the organic law of the nation." *The Laws and Jurisprudence of England and America* (1894), pp. 208-212. "The great fundamental rights," said Judge Dillon, "guaranteed by [American] constitutions are life, liberty, contracts and property." *Ibid.*, p. 203. One can readily discover that judicial construction had an extraordinarily large share in giving this sort of a content to the meaning of the Fourteenth Amendment.

¹ *Monongahela B. Co. v. United States*, 216 U. S. 177, 195 (1910).

² *Twining v. New Jersey*, 211 U. S. 78, 106 (1908). "We cannot interfere [with a judgment of a state court] unless the judgment amounts to mere arbitrary or capricious exercise of power, or is in clear conflict with those fundamental principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights." Justice McReynolds in *American Ry. Express Co. v. Kentucky*, 273 U. S. 269, 273 (1927).

justices and of the marked change in the meaning of due process of law, the assertion is repeated consistently that judges in the decision of cases have nothing to do with the wisdom, justice, or expediency of legislative acts.¹

3. *Police Regulations must be Reasonable.* The extensive limitations which were inserted in the state constitutions and the implied limitations developed by the courts placed many restrictions upon the authority of the states and rendered it difficult to meet the public needs and requirements. Hence the doctrine of the police power was conceived as a kind of safety-valve through which the necessary authority for the protection of the public order, public morals, and public health might be authorized despite these restrictions.² But the exercise of such powers, it was eventually held, was subject to the requirements of due process of law and equal protection of the laws and the general necessity of reasonableness. American courts, following the English practice, held that the by-laws of a municipal corporation, unless expressly authorized by a legislative act, must be reasonable, and must not be inconsistent with the general principles of the common law, particularly those having relation to the liberty of the individual or the rights of private property.³ This meant that ordinances might be held void which were deemed unfair, oppressive, or discriminatory.

¹ For an extensive list of citations that the Supreme Court has no right to inquire into the wisdom or justice of the acts of the federal or state governments, see Robert P. Reeder, "Constitutional and Extra-Constitutional Restraints," *Univ. of Pa. Law Rev.*, LXI (May, 1913), 441, 446, 456. Regarding the statements of justices relating to inalienable rights, fundamental rights, and rights which grow out of the essential nature of free governments, Mr. Reeder thinks "it is sufficient to say that the premises upon which they are based have been abandoned by thoughtful men for over a century, [and] that those statements are against the vast weight of direct authority." For another summary of judicial opinions that courts may not pass on the justice or expediency of legislative acts, consult Cooley, *Constitutional Limitations* (8th ed.), I, 341 ff.

² Cooley, *Constitutional Limitations* (8th ed.), chap. 21; also Freund, *The Police Power: Public Policy and Constitutional Rights* (Chicago, 1904), especially chap. 1.

³ Dillon, *Municipal Corporations* (5th ed.), sec. 589.

State legislatures, also, in their efforts to regulate social and industrial conditions were held subject to the requirement that "under the mere guise of police regulations personal rights, and property rights cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive."¹ It was also held for the courts to decide whether a regulation had in fact some relation to the public health, whether it was appropriate, and adapted to the end aimed at.²

The federal justices, who first refused to interfere with the police powers of the state under the due process provision, were prevailed upon to adopt the dictum of the New York court,³ that the power to regulate is not the power to destroy,⁴ and to render this dictum applicable to all types of social legislation. A rule of reason test for police regulations extensive in its scope was also formulated by Justice Peckham.⁵

A state law, therefore, might be held void when enacted to protect the public health, the public morals, or the public safety if it had "no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law."⁶

¹ Justice Earle, *in re Jacobs*, 98 N. Y. 98, 110 (1885). Due process of law, as a limitation on the police power of the federal government, was suggested by Chief Justice Taney in *Dred Scott v. Stanford*, 19 How. 393, 450 (1856) and referred to in several dissenting opinions but was consistently repudiated by the federal justices. Justice Field expressed the prevailing sentiment when he declared that the Fourteenth Amendment was not "designed to interfere with the power of the state, sometimes termed its police power." *Barbier v. Connolly*, 113 U. S. 27, 31 (1885). For reference to additional cases, see Mott, *op. cit.*, pp. 334, 335.

² Justice Peckham in *People v. Gibson*, 109 N. Y. 389, 400 ff. (1888). Cf. as to the definition of the term "liberty," citing chiefly Justice Field's opinions in the Supreme Court and Justice Andrews' opinion in *Bertholf v. O'Reilly*, 74 N. Y. 509 (1878); *in re Jacobs*, *supra*; and *People v. Marx*, 99 N. Y. 377 (1885).

³ *Wynehamer v. State of New York*, 13 N. Y. 378, 392 ff. (1856).

⁴ Chief Justice Waite in *Stone v. Farmers' Loan and Trust Co.*, 116 U. S. 307, 331 (1886) and Justice Brewer in *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 397 (1893).

⁵ *Lochner v. New York*, 198 U. S. 45, 56 (1898).

⁶ Referring to the decision of the Supreme Court in *Yick Wo v. Hopkins*, 118 U. S. 356 (1885) in which a municipal ordinance was held void because its administration

The criteria by which the Supreme Court determines whether a state act is a legitimate exercise of the police power are:

1. The object of the legislation must be permissible.
2. The means must have a substantial relation to the end.
3. Fundamental rights must not be infringed.
4. The effect of the enforcement of the law must not be arbitrary, unreasonable, or oppressive.¹

Thus it will be seen that the courts may adopt Locke's dictum and hold that an act which appears to them unwise is not within the scope of legislative action. Or they may conclude that the ways and means adopted by the legislature are not appropriate to accomplish the object intended. If an act meets these tests it may run afoul of the fundamental rights of the individual and what are fundamental rights has never

was regarded as arbitrary and discriminatory, Justice Brown said: "While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power." *Plessy v. Ferguson*, 163 U. S. 537, 550 (1895). See also *Justice Peckham in Lake Shore and Michigan Southern Ry. Co. v. Smith*, 173 U. S. 684, 689 (1899), and in *W. M. & P. R. R. Co. v. Jacobsen*, 179 U. S. 287, 297 (1900). The police power is subject to judicial review and property rights cannot be wrongfully destroyed by arbitrary enactments. Justice Day in *Dobbins v. Los Angeles*, 195 U. S. 223, 236 (1904). Cf. also Justice Harlan in *Jacobson v. Massachusetts*, 197 U. S. 11, 31 (1904); cases cited to sustain this view are *Mugler v. Kansas*, 123 U. S. 623, 661 (1887); *Minnesota v. Barber*, 136 U. S. 313, 320 (1889); *Atkin v. Kansas*, 191 U. S. 207, 223 (1903). "The principle involved in these decisions," said Justice Hughes, "is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power." *Chicago, Burlington & Quincy Ry. Co. v. McGuire*, 219 U. S. 549, 569 (1910).

The general result is that specific provisions of constitutions are likely to be enforced literally but indefinite provisions such as due process of law and the equal protection of the laws will be applied so as to prohibit governmental acts which are considered as against natural justice.

No proceeding may be declared invalid "unless in conflict with some special inhibitions of the Constitution, or against natural justice." Justice Brewer in *Arndt v. Griggs*, 134 U. S. 316, 321 (1890). "Under the Fourteenth Amendment, the legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice." Justice Brown in *Turpin v. Lemon*, 187 U. S. 51, 60 (1902).

¹ "A police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion." Cooley, *Constitutional Limitations* (8th ed.), II, 1231.

been determined. Finally, it must meet the test of reasonableness, which is the most difficult of all requirements, for who knows what will appear reasonable to the judicial mind?¹ It is not surprising then for the conclusion to be reached, after a thorough analysis of the attempts to apply the criterion of due process of law to cases arising under the police power, that the opinions of the Supreme Court "have confused rather than clarified the subject and that from such attempts have come no rules, standards, or principles capable of certain applications to concrete cases."²

The criteria upon which the court proceeds in such cases, it is observed, are largely subjective and depend upon the personal, political, and economic opinions of the justices. The terms "arbitrary," "unreasonable," and "oppressive" are not defined in the written law and can be applied only "in the light of the judges' own mental processes."³ It is here that the silence of the Constitution speaks in a voice tuned only to judicial ears.

The situation resulting from the application of the general language of the Fourteenth Amendment to state legislation on social and industrial matters is thus summarized by Mr. Nesbitt:

The difficulty with what I have chosen to call the categorical view of the due process of law requirement as applied to legislation, dealing with social and economic changes, is that it extols bare authority at

¹ Thomas Reed Powell, "The Judiciality of Minimum Wage Legislation," *Harvard Law Review*, XXXVII (March, 1924), 545.

² Ray A. Brown, "Due Process of Law, Police Power, and the Supreme Court," *Harv. Law Rev.*, XL (May, 1927), 943, 966.

³ Brown, *op. cit.*, p. 956. President Goodnow quotes Professor Seager's conclusion that "the question of the constitutionality of a restrictive labor law is inseparably connected with the question of the wisdom of such a law." And then he adds: "What the courts actually do in cases in which they declare a law of this sort unconstitutional, is to substitute their ideas of wisdom for those of the legislature, although they continually say that this is not the case." *Social Reform and the Constitution* (New York, 1911), p. 247, and Henry R. Seager, "The Attitude of American Courts toward Restrictive Labor Legislation," *Political Science Quarterly*, XIX (December 1904), 589.

the expense of experience; that it results in the deductive application of general principles to precise facts often without any accommodation to the particular situation out of which the legislation has arisen; that it tends to limit the content of the clauses to a fixed, unconditional meaning, precluding all flexibility in their application; that it construes the due process of law clauses not so much as broad guarantees of "relatively fundamental rights" as the regulations of a code, as arbitrary abstract principles rather than organic rules; and that it excludes consideration of public opinion as a fact to be taken into account in determining the reasonableness of legislation, thus making the opinion of the court as fixed by judicial experience the measure of the limit of the legislative function. The standard of reasonableness which it would apply is remote and traditional.¹

There is involved in much of the reasoning of the judges in the cases under the police power an assumption of inherent superiority of the wisdom and judgments of justices over the judgments of members of the other departments of government. The legislature, it is asserted, cannot invade the rights of person or property, under the guise of a police regulation when it is not such in fact. It is insisted also that it is the province of the judiciary to determine when personal or property rights have been invaded and whether a measure is appropriate for the desired object.² Constitutions do not define police regulations which do or do not invade personal or property rights nor do they give any indication as to the

¹ James L. Nesbitt, "Due Process of Law and Opinion," *Col. Law Rev.*, XXVI (January, 1926), 22, 27. The categorical view of due process of law, Mr. Nesbitt thinks, is best illustrated in the majority opinion in the *Minimum Wage Case*, *Adkins v. Children's Hospital*, 261 U. S. 525 (1923). When the Supreme Court, under the due process clause, performs "the function of umpiring the contest between competing social forces" Mr. Nesbitt finds that three attitudes are in evidence: first, an abstract standard to determine the line between reasonable regulation and arbitrary restraint, e.g., Justice Sutherland's opinion in the *Minimum Wage Case*; second, a personal standard of the court, such as that of Chief Justice Taft and Justice Sanford in the same case; and third, a standard of what others have declared reasonable; see Justice Holmes in dissent, *Lochner v. New York*, 198 U. S. 45, 76 (1898).

² Legislatures may use only such means as are reasonably designed to deal with existing conditions, *Herlihy v. Donahue*, 52 Mont. 601, 610, 161 Pac. 164 (1916); also Mott, *op. cit.*, p. 539. On the way in which the "silence of the original Constitution utters restraints," see T. R. Powell, "Due Process Tests of State Taxation," *Univ. of Pa. Law Rev.*, LXXIV (March, 1926), 423, 573.

appropriate objects of such regulations. Police power as a constitutional concept is a judge-made concept arising from the assumption that legislatures are disposed to fritter away constitutional inhibitions and that it is the duty of judges to prevent such legislative depredations. The term "police power" was hit upon as a convenient phrase for the courts to determine whether a legislative act which interfered with private rights was reasonable enough to have judicial approval.

What the whole matter amounts to, we are told, is: "There must be some sort of reasonable balance between the degree of interference with private rights and the public benefit which may be expected to flow from that interference."¹ What is a "reasonable balance," and who is in the best position to decide this question — a judge or a legislator — probably a judge if the chief object is to preserve private rights, and a legislator if the public interest and convenience is to be given superior weight?

4. *Results of the Extension of the Meaning of Due Process of Law.* With judicial review of legislative enactments applied *via* due process of law to the main lines of public regulation of business and economic conditions, it was not long before the Fourteenth Amendment took its place as the foremost feature of the federal Constitution, so far as the limitations on the powers of the states are concerned. Whereas for the first twenty years after the adoption of the amendment about one case per year on the average arose under its provisions, it was not long before thirty or more cases were adjudicated in the same period. In such important fields of state power as eminent domain, taxation, public utility regulation, and the police power, state and local acts had been attacked before the Supreme Court in more than six hundred cases to the year 1910.²

¹ Mott, *op. cit.*, p. 539.

² Charles Wallace Collins, *The Fourteenth Amendment and the States* (Boston,

To 1910 according to the table of Collins the following questions had been raised under the Fourteenth Amendment:

Eminent domain	27 cases
Taxation	144 “
Matters of procedure	146 “
Police power	302 “

Most of the cases which have arisen under this amendment have been decided since 1896. From 1900 to 1913 there were four hundred and nine opinions or about thirty one per year. Out of a total of more than six hundred cases only twenty-eight dealt with the rights of the negro race for whose protection the amendment was primarily enacted. More than half of the cases have come to the court on appeals of public utility interests and other corporate organizations asking protection from the acts of the legislatures and administrative agencies of the states.¹ Though the amendment was enacted primarily as a charter of liberty for the negro race it has been used to a great extent by corporations, public and private, to resist the efforts toward public regulation and to check the exercise of state authority through eminent domain, taxation, and the police power.²

1912), p. 183. See also summary of Judge Hough in *Harv. Law Rev.*, XXXII (January, 1919), 229, where it is noted that from 1868 to the 1910 term of the Supreme Court there were more than four hundred cases interpreting due process of law alone and less than one hundred before 1883. From 1890 to 1900 there were one hundred and ninety-seven appeals under the recent cases relating to corporations, with public service companies predominating.

¹ See Collins, *op. cit.*, p. 183.

² The Supreme Court, says Professor Commons, has legislated by definition: "It changed the meaning of due process of law and thus amended the federal and every state constitution. It changed the meaning of property and liberty as used in the Fourteenth Amendment and thus took over from the states the final determination of what was due process of law in the regulation of property and business." *Legal Foundations of Capitalism*, p. 355. The change in the court's interpretation of the term "due process of law," Mr. Willis thinks, was brought about "through the efforts of corporations; through a change in the personnel of the bench, and through the personal activity of Justice Field, who always championed this doctrine and who strangely, in writing an opinion for the Supreme Court, cited his own opinion while a circuit judge as the opinion of the Supreme Court." *Minneapolis Ry. Co. v. Beckwith*, 129 U. S. 26 (1898); "Due Process of Law under the United States Constitu-

As a result of such a series of decisions, quasi-legislative in character, the prohibitions involved in due process of law were held applicable to substantive law as well as to legal procedure, to executive, administrative, and judicial acts as well as to legislation, and to corporations as well as to natural persons.¹ Writing in 1919, Judge Hough believed that "the direct appeal of property to due process of law had for the most part failed. . . . The indirect appeal through liberty is still going on. . . . But it is dying, and the courts, when invoked today under the due-process clause, are doing little more than easing the patient's later days."² That this prediction is not being fulfilled is shown by the fact that since 1920 more acts in the field of social and economic legislation have been invalidated under the due process clause than were set aside from 1868 to 1920.³

Phrased in percentages this means that from 1868 to 1912 the Court held against the legislature in a very little more than six per cent of the cases; from 1913 to 1920 in a little more than seven per cent of the cases; while since 1920 the Court has held against the legislature in twenty-eight per cent of the cases. And if we go behind the decisions and look at the votes of the individual judges in each case, we will find the same startling increase in the number of opinions adverse to the validity of legislation under the due process clauses. In the period

tion," *Univ. of Pa. Law Rev.*, LXXIV, 337; and *County of San Mateo v. Southern Pacific Ry. Co.*, 13 Fed. 722 (1882).

¹ Willis, *Univ. of Pa. Law Rev.*, LXXIV, 338. Mr. Willis claims that by attacking all forms of state legislation before the Supreme Court corporations are attempting to undermine our dual form of government. *Ibid.*, p. 342. The Fourteenth Amendment, in the judgment of Mr. Collins, was to be a charter of liberty for human rights, but it operates today to protect primarily the rights of property. It has become the Magna Carta of organized capital. It "gives to the federal government undefined and illimitable control over every phase of state activity. It throws into the hands of the Supreme Court of the United States more power over the states than does all the rest of the Constitution combined." Collins, *op. cit.*, pp. 146 ff.

² "Due Process of Law—Today," *Harv. Law Rev.*, XXXII, 218, 233. For similar judgments regarding the decline of significance of this phrase, consult Charles Warren, "The Progressiveness of the United States Supreme Court," *Col. Law Rev.*, XIII (April, 1913), 204, and Robert E. Cushman, "The Social and Economic Interpretation of the Fourteenth Amendment," *Michigan Law Review*, XX (May, 1922), 737, 757 ff.

³ Ray A. Brown, *op. cit.*, pp. 943 ff.

up to 1921 the judicial vote was cast approximately ninety per cent in favor of the various statutes considered, and only ten per cent against. Since then, however, the favorable vote has shrunk to about sixty-nine per cent and the adverse vote grown to thirty-one per cent.¹

Evidently the justices regard with increasing seriousness their assumed duty to guide political action in a safe course so as to avoid the dangers of economic or social radicalism.

5. *Some Examples of Higher Law Concepts in Recent Supreme Court Decisions.* The doctrine of liberty of contract, an inalienable-right product, is now construed as involved in the Fifth and Fourteenth Amendments. This doctrine was applied in a decision of the Supreme Court of the United States by holding invalid the Minimum Wage Act passed by Congress for the District of Columbia.² Justice Sutherland, rendering the opinion of the court, held that the right to contract about one's affairs is a part of the liberty of the individual protected by the Fifth Amendment. Quoting with approval the much criticized opinion of Justice Peckham in the case of *Lochner v. New York*,³ he concluded that the Act of Congress was

simply and exclusively a price-fixing law, confined to adult women — who are legally as capable of contracting for themselves as men. It

¹ *Ibid.*, pp. 944, 945.

² *Adkins v. Children's Hospital*, 261 U. S. 525 (1923). The committees of both Houses of Congress unanimously recommended the legislation, House Rep. No. 571 and Senate Rep. No. 562, 65th Congress, 2d Session. The House of Representatives passed the bill without opposition, and only twelve votes were recorded against it in the Senate, vol. LVI, Cong. Rec., Pt. 9, pp. 8875 ff.; Pt. 10, pp. 10278 ff.; Pt. 12, pp. 604 ff. In the consideration of this case some extracts are used from an editorial note by the writer in *Texas Law Review*, II (December, 1923), 99.

³ 198 U. S. 45 (1904). It is a well-known fact that in the attempts of the federal courts to define due process of law there has been much wavering and uncertainty, and dissenting opinions have been prevalent. The court seldom reverses itself in the interpretation of due process — it explains, distinguishes, or modifies. The effect is often a reversal in whole or in part. The uncertainties and misapprehensions are apparent in the general impression of the bench and bar that the majority opinion in the *Lochner Case* had been overruled, and that the court had adopted the minority views of Justice Holmes and the reiteration of the majority views in that case by Justice Sutherland, rendering the opinion in *Adkins v. Children's Hospital*. See Fletcher Dobyns, "Justice Holmes and the Fourteenth Amendment," *Illinois Law*

forbids two parties having lawful capacity — under penalties as to the employer — to freely contract with one another in respect of the price for which that one shall render services to the other in a purely private employment where both are willing, perhaps anxious, to agree.¹

The standard for the guidance of the board under the act was regarded so vague as to be impossible of practical application. It took into account the necessities of only one party to the contract and it fixed an arbitrary wage payment and thus interfered with economic *laissez faire*; altogether the act, Justice Sutherland declared, was “clearly the product of a naked, arbitrary exercise of power.”²

Chief Justice Taft, dissenting, with whom concurred Justice Sanford, took issue with the contention that there is, in many instances, a substantial equality as between employer and employee. He admitted that the policy of a compulsory minimum wage is one on which there is much dispute but he thought it was “not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the Court believes to be unwise or unsound.”³ The principle of the limitation of liberty of contract was recognized by the court in the regulation of wages and labor conditions under the police power and it seemed difficult to understand the difference between regulating the manner and time of payment of wages or fixing maximum hours of labor and the fixing of a minimum wage.⁴

Review, XIII (June, 1918), 71, 92, and Cardozo, *The Nature of the Judicial Process* (New Haven, 1922), p. 79.

¹ 261 U. S. 554, 555. Referring to Justice Sutherland's views on the freedom of contract in the *Minimum Wage Case*, Powell remarks, “It represents his personal views of desirable governmental policy. Those views are shared by many others, but they are not written into the Constitution of the United States except as judges from time to time have inscribed them there.” “The Judiciality of Minimum Wage Legislation,” *Harv. Law Rev.*, XXXVII (March, 1924), 545, 555, 556.

² 261 U. S. 559.

³ *Ibid.*, 562.

⁴ See *Holden v. Hardy*, 169 U. S. 336 (1897), limiting employment of workmen in mines to eight hours per day; *Patterson v. The Eudora*, 190 U. S. 169 (1903), pro-

In his opinion the *Lochner Case* was overruled and he expressed surprise at the attempt of the majority justices to quote the case as a precedent. The intimation that the controlling effect of earlier opinions had been weakened by the Nineteenth Amendment was answered by the statement that this amendment did not change the differences between men and women recognized by Congress in the passage of this act.

Justice Holmes also dissented and observed that:

Notwithstanding the deference due to the prevailing judgment of the Court, the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality, and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are the means that have the approval of Congress, of many states, and of those governments from which we have learned our greatest lessons. When so many intelligent persons, who have studied the matter more than any of us can, have thought that the means are effective and are worth the price, it seems to me impossible to deny that the belief reasonably may be held by reasonable men. . . .

The earlier decisions upon the same words in the Fourteenth Amendment began within our memory, and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, liberty of contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts.¹

The opinions of Justice Van Orsdel of the District of

hibiting masters from paying seamen in advance; *Muller v. Oregon*, 208 U. S. 412 (1908), limiting hours of labor of women employed in laundries to ten hours per day; *Riley v. Massachusetts*, 232 U. S. 671 (1914), limiting employment of women in manufacturing establishments to ten hours per day, or not more than fifty-six hours per week; *Erie Railway Co. v. Williams*, 233 U. S. 685 (1914), prohibiting employers from paying employees less often than semi-monthly; *Bosley v. McLaughlin*, 236 U. S. 385 (1915), limiting employment of women for more than eight hours per day, or more than forty-eight hours per week in certain designated employments; *Bunting v. Oregon*, 243 U. S. 426 (1917), forbidding employment of anyone in mill or factory for more than ten hours per day.

¹ 261 U. S. 567, 568.

Columbia Court and Justice Sutherland illustrate the attenuated methods of reasoning involved in declaring void legislative acts under the phrase "due process of law."¹ They likewise illustrate the process of judicial interpretation by which implied limitations on legislative powers are extracted from the general language of constitutions. It is the method of reasoning which first discovered a doctrine of vested rights which might be preserved whether or not constitutions gave such a protection, which found inherent limitations on legislatures to protect property rights through the terms "public purpose" and "public use," and which, lacking any express provision, fell back on the spirit of the constitution or the general principles of free government to condemn, as Justice Holmes suggests, what "a tribunal of lawyers does not think about right."² Both justices assume certain fundamental principles and then by what appears to them as "indubitable demonstration" they conclude that the acts are arbitrary, unreasonable, and necessarily void — as contrary to due process of law. Here is an application of the old natural rights and natural law philosophy, combined with the mechanical concept of the functions of the court. That there is no clear dividing line between arbitrary restraint and reasonable regulation; that the determination of the dividing line is largely one of policy on which the judgment of the legislature with the full facts before it ought to be relatively sound, or can be readily changed, if found unsound; and that a court is overstepping the bounds of its legitimate authority to pass on the wisdom or folly of the economic policy of wage legislation, did not make any difference to the

¹ On the effect of the personal influences in the decisions of the Supreme Court on labor cases, see Powell, "The Constitutional Issue in Minimum Wage Legislation," *Minnesota Law Review*, vol. II (December, 1917). The reasoning of the court in the *Adkins Case* led to a judgment against the validity of the Arizona Minimum Wage Act and to a condemnation of other meliorative acts. See *ex parte Smith* 223 Pac. 971 (1924).

² *Collected Legal Papers*, p. 184.

justices imbued with the doctrine of fundamental principles or of a modern *Naturrecht*.

Conceived in the spirit of individualism and *laissez faire* characteristic of the pioneer conditions which prevailed in a large part of the country more than a generation ago, the concept of liberty of contract as an absolute right is ill suited to the industrial conditions now prevailing in many American communities.¹ If there is any field in which the precept should prevail that law is a progressive science, that rights are subject to restrictions and limitations as the social interest may require, and that the determination as to what restrictions are on the whole wise and salutary belongs primarily to the legislature, it is the growing field of the necessary regulations and adjustments in the wage contract. A minimum wage law may or may not be wise from the economic or social viewpoint. But the best way to determine its wisdom or unwisdom would appear to be to give it a trial under terms and conditions laid down by a legislative body which could change those conditions, if the act proved unwise after a fair trial. For the court to prevent such experimentation, with the care, foresight, and experience manifested in the enactment and administration of labor laws, under an attenuated view of due process of law, protecting liberty and property, is to place too heavy a burden upon the judiciary and to throttle the avenue of advance for government to meet the growing needs of modern economic and industrial society.

When the bakers resisted the enforcement of a Nebraska statute providing for standard sizes for loaves of bread with an allowance for an excess over the specified standards, as

¹ "Though neither the doctrine of individualism nor of *laissez faire* is contained in the language of the constitution, they permeate many judicial opinions interpreting the constitution." Powell, "The Constitutional Issue in Minimum Wage Legislation," *Minn. Law Rev.*, II, 11. For a different interpretation see Brown, *ibid.*, I (June, 1917), 471.

unnecessary, unreasonable, and arbitrary, the Supreme Court held, Justice Butler rendering the opinion, that the state may not "under the guise of protecting the public arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." The provisions of an act must have, he demanded, a reasonable relation to the protection desired to be accomplished.¹ Regarding the act as essentially unreasonable and arbitrary it was held void as contrary to the Fourteenth Amendment.

Justice Brandeis, dissenting, stated the problem of the application of the rule of reason in such cases as follows:

With the wisdom of the legislation we have, of course, no concern. But, under the due process clause as construed, we must determine whether the prohibition of excess weights can reasonably be deemed necessary; whether the prohibition can reasonably be deemed an appropriate means of preventing short weights and incidental unfair practices; and whether compliance with the limitation prescribed can reasonably be deemed practicable. The determination of these questions involves an enquiry into facts. Unless we know the facts on which the legislators may have acted, we cannot decide whether they were (or whether their measures are) unreasonable, arbitrary, or capricious.²

After an extensive summary of evidence showing the practical necessity of the prohibition of excess weights as a means of preventing short weights, he concluded:

The evidence contained in the record in this case is, however, ample to sustain the validity of the statute. There is in the record some evidence in conflict with it. The legislature and the lower courts have, doubtless, considered that. But with this conflicting evidence we have no concern. It is not our province to weigh evidence. Put at its highest, our function is to determine, in the light of all facts which may enrich our knowledge and enlarge our understanding, whether the measure, enacted in the exercise of an unquestioned police power and of a character inherently unobjectionable, transcends the

¹ *Burns Baking Company v. Bryan*, 264 U. S. 505, 513 (1923).

² *Ibid.*, 519, 520.

bounds of reason. That is, whether the provision as applied is so clearly arbitrary or capricious that legislators acting reasonably could not have believed it to be necessary or appropriate for the public welfare.

To decide, as a fact, that the prohibition of excess weights "is not necessary for the protection of the purchasers against imposition and fraud by short weights"; that it "is not calculated to effectuate that purpose"; and that it "subjects bakers and sellers of bread" to heavy burdens, is, in my opinion, an exercise of the powers of a super-legislature — not the performance of the constitutional function of judicial review.¹

Again the majority of the court, as in the *Minimum Wage Case*, refused to accept the judgment of the legislature on the facts and then condemned the policy determined by the legislative body to deal with the facts.

The vacillation and uncertainty involved in according a general power of review over state acts to judges who are likely to be unfamiliar with the local conditions which prompted the acts are shown in many recent cases. There are cases in which the judges indicate a disposition to place the burden of proof upon those who attack state statutes and to defer to the judgment of state authorities, legislative and judicial.² When this tendency was beginning to be considered as a rule of law,³ the justices again showed an inclination to resort primarily to their own judgments of facts and local conditions. The refusal to give special consideration to local conditions, is indicated in the *New York Theater Ticket Case*.⁴

¹ 264 U. S. 533, 534.

² "One who assails the classification [made by a state legislature] must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Justice Sanford in *Whitney v. California*, 274 U. S. 357 (1927) citing *Linsley v. Natural Carbonic Gas Co.*, 220 U. S. 62, 78, 79 (1910).

³ Mott, *op. cit.*, pp. 562 ff.

⁴ *Tyson and Bro. United Theater Ticket Offices v. Banton*; 273 U. S. 418 (1927). Referring to the failure of the justices to give due weight to the evidence before the legislature in the case of *Lochner v. New York*, 198 U. S. 45 (1905), Sir Frederick Pollock believes that "the legal weakness of this reasoning, if we may say so, is that no credit seems to be given to the state legislature for knowing its own business and it is treated like an inferior court which has to find affirmative proof of its com-

The New York legislature passed a law to remedy notorious abuses in the resale of theater tickets, because in its judgment the matter was of sufficient public interest to warrant public regulation. But the Supreme Court declared the law void on the ground that the act was an unwarranted interference with a private business. "The mere declaration by the legislature," said Justice Sutherland, "that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry."¹

Justice Holmes, who has expressed more frequently and insistently than any other justice the view that the justices have substituted their views of public policy for those of the legislature, said in a dissenting opinion,

I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain. . . . I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the State of New York speaking their authorized voice say they want it, I see nothing in the Constitution of the United States to prevent their having their will.²

Reasonable as this opinion may seem, the majority of the

petence. How can the Supreme Court at Washington have conclusive judicial knowledge of the conditions affecting bakeries in New York? If it has not such knowledge as matter of fact, can it be matter of law that no conditions can be reasonably supposed to exist which would make such an enactment, not necessarily wise or expedient (for no one attributes to any court, state or federal, a general jurisdiction to review legislation on the merits) but constitutional?" "The New York Labour Law and the Fourteenth Amendment," *Law Quarterly Review*, XXI (July, 1905), 212.

¹ Tyson and Bro. United Theater Ticket Offices v. Banton, 273 U. S. 418 (1927). As authority for this view, *Wolff Co. v. Industrial Court*, 262 U. S. 522, 536 (1922) was cited.

² 273 U. S., 433, 434.

Supreme Court have declared otherwise. Again, when Minnesota attempted to prohibit buyers of dairy products from discriminating between localities, the majority of the Supreme Court refused to accept the legislative determination of facts and held the law invalid as an unwarranted interference with freedom of contract.¹

The way in which the Supreme Court makes law in interpreting the Fourteenth Amendment is illustrated in the gradual inclusion of the first eight amendments, which were held to apply only to federal law and procedure,² as a part of the Fourteenth Amendment — and hence as limitations on state laws and procedure. Subsequent to the *Barron Case* it was held frequently that the provisions of the Bill of Rights of the federal Constitution were not applicable to state action. This opinion was reaffirmed in recent decisions when it was asserted that “neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restriction about freedom of speech.”³ But three years later Justice Sanford, upholding the validity of the New York Criminal Anarchy Law, said: “We may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgement by Congress — are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the States.”⁴

¹ Fairmont Creamery Co. v. Minnesota, 274 U. S. 1 (1927).

² Barron v. Baltimore, 7 Pet. 243 (1833). See comment of Chief Justice Waite in 1876 that “it is now too late to question the correctness of this construction,” and citation of cases, *Harv. Law Rev.*, XXXIX (February, 1926), 436.

³ Prudential Insurance Co. v. Cheek, 259 U. S. 530, 538, 543 (1922); Patterson v. Colorado, 205 U. S. 454 (1907).

For the claim that it was the intention of the framers of the Fourteenth Amendment that the rights and privileges of the first eight amendments should be the “secure possession of every citizen” of the United States, beyond the power of any state to abridge,” see Guthrie, *Lectures on the Fourteenth Article of Amendment to the Constitution of the United States*, p. 61.

⁴ New York v. Gitlow, 268 U. S. 652, 666 (1925). Justice Sanford said that the court did not regard the statement quoted above from the Prudential Insurance

Repeated efforts to secure protection from the federal courts in such matters as state interferences with the right of suffrage, the right of assembly, the right to bear arms, the right of impartial trial, the right against cruel and unusual punishment, the right against compulsory self-incrimination¹ were given little countenance prior to 1925. In 1925 it is assumed without argument or discussion that the fundamental rights and liberties of the first eight amendments are protected by the due process clause of the Fourteenth Amendment. "Despite arguments to the contrary which had seemed to me persuasive," said Justice Brandeis,

it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the federal Constitution from invasion by the states. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights.²

Justice Stone, speaking of the holding of the Supreme Court that the Sherman Anti-Trust Law prohibits only such restraints upon interstate commerce as are unreasonable, says: "Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines." And recognizing the uncertainty of the test of reasonableness as a legal concept, he continues:

Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so

Cases as "determinative," but he does not refer to the other cases in which similar opinions were rendered.

¹ See *Minor v. Happersett*, 21 Wall. 162 (1874), 1; *United States v. Cruikshank*, 92 U. S. 542 (1875); *in re Kemmler*, 136 U. S. 436 (1890); *Twining v. New Jersey*, 211 U. S. 78 (1908).

² *Whitney v. California*, 274 U. S. 357 (1927).

uncertain a test as whether prices are reasonable — a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.¹

If such complete economic surveys had been made would a ten-hour bakeshop law, or a minimum wage law as well as a number of other state and federal acts have been declared void?

When the Fourteenth Amendment was construed to prohibit state legislative and administrative acts which were deemed arbitrary, to prevent any interference with fundamental rights, to require that all state and local police regulations must be reasonable, and the justices determined that it was their duty to examine the facts on which state legislative and administrative policies were based as well as the ends to be accomplished by regulation, a change in the American system of government was effected, the results of which are only beginning to be realized. The change has its roots in the political and legal thinking of earlier periods but few could have surmised what a significant turn in political practice was to follow from a slow and silent revolution in constitutional interpretation.²

¹ *United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927). For applications of the concept of reasonableness in passing on the validity of combinations in restraint of trade, consult *U. S. v. Trans-Missouri Freight Association*, 166 U. S. 290 (1896); *Northern Securities Co. v. United States*, 193 U. S. 197 (1903); *Standard Oil Co. v. United States*, 221 U. S. 1 (1910); *United States v. American Tobacco Co.*, 211 U. S. 106 (1910).

"It is submitted that up to the present time very little can be learned as to the meaning of due process of law from the decisions of the Supreme Court as to what in its judgment is reasonable and what unreasonable. They neither give us a rule of law nor a definition." Willis, *Univ. of Pa. Law Rev.*, LXXIV, 338, 339. See comment how the Supreme Court, in finding a new meaning for due process of law, made some new constitutional law. P. 339.

² For comments on one phase of this revolution, see F. Dumont Smith, "Decisive Battles of Constitutional Law," *American Bar Association Journal*, X, 505, and *The Constitution: Its Story and Battles*, chap. 15.

CHAPTER VIII

NATURAL LAW DOCTRINES AID IN CHANGING THE BASIS FOR JUDICIAL REVIEW OF LEGISLATIVE ACTS

BEGINNING with the dominance of the Federalist Party over the political affairs of the country after the inauguration of the federal Constitution in 1789, a tradition was established which insisted that the continuance of federalism and its control over political affairs was essential to the political peace and order of the country, and that anti-federalism tended in the direction of chaos and ruin. This tradition was fostered in large part through the business and commercial interests over which Hamilton and his successors held sway. For the greater part of the nineteenth century the successors of the Federalist Party preserved the doctrine that peace and order depended upon their control and insisted that the turning over of the government to their opponents would bring ruin and disruption to the country.

To prevent an excess of democracy and the disorders supposed to accompany the people's management of public affairs there was an insistence that one department of government must not be directly influenced by temporary public opinion, and it was determined to make the judiciary such a stabilizing power.¹

Under the leadership of such men as Chief Justice Marshall, Justice Joseph Story, and Daniel Webster, it came to be an accepted view that nationalist, conservative, and commercialist views of American law and politics were looked upon as sound statesmanship and opposite views were identi-

¹ A. J. Beveridge, *The Life of John Marshall*, III, 109. 'A'

fied with ruin and disunion. The Republican Party, which became the successor of the old Federalist and Whig Parties, accepted and fostered the conservative and capitalist traditions championed by the old Federalist Party. After the program was inaugurated of applying the resources of the government to economic development through a liberal land policy, which gave an impetus to the settlement of the frontier, through subsidies and land grants to railways, which gave settlers access to world markets, and through protective duties, which were designed to build up home industries, the party adopted the principles and practices of the coalition between the commercial and capitalist interests which were characteristic of the policies of Alexander Hamilton. Hence the party leaders again asserted the former contention that their control of the country alone could preserve peace and order.

As the Democratic Party was disrupted through the realignments resulting from the Civil War it was easy to maintain the position that the turning over of the government to this party would, as was charged against the anti-federalists many decades earlier, lead the people in the direction of political disorder and ruin. The old doctrine is continued in the oft-repeated claim that the decisions of John Marshall "remain the charter of courts of justice in the modern republican world: the world of law and constitutional government. They speak order, power, progress and peace. Had a contrary conception of civil institutions prevailed, could anything else have followed than weakness and strife, decay and chaos?"¹ It has become one of the axioms of American political philosophy that "to maintain the principle that there is a limit in republican government to the power of the ma-

¹ F. N. Thorpe, "Hamilton's Ideas in Marshall's Decisions," *Boston University Law Review*, I (1921), 9.

jority to make laws is one of the most valuable functions the courts have to perform.”¹

1. *Conservative Doctrines and Judicial Review of Legislation.* The battle cry of those who believe in conservative doctrines is that every effort must be made to place limits upon the despotism of the majority.² No device is better designed to accomplish this end than the practice of the judicial review of legislative acts with a written constitution as an express guide and with a broad rule of reason as a supplementary weapon of defence. And a principle of government which was identified with one of the great parties of American political development has been espoused by the leaders of both major parties.

The conservative reaction, which, among other things, secured the judicial application of the doctrine of inherent limits on legislative powers and left its impress upon the Fourteenth Amendment to such an extent as to bring a change in the federal Constitution greater than all amendments and interpretations made since 1789, was not the result of any one group, division, or class of the American people. Like the medley of interests which combined to make and to secure the adoption of the Constitution, a rather unusual combination of individuals, groups, and interests joined forces to bring about a radical change in the adjustment of relations between the nation and the states. A peculiar set of circumstances, economic, political, social, and philosophic, gave color to dominant modes of thinking which affected all, including the justices in state and federal courts. Certain ideas were fostered and became the stock in trade of the politicians and of the legal fraternity. It is not surprising, therefore, to find the state and federal justices about the same time giving form and utterance to the peculiar concept of “liberty of con-

¹ Edward Q. Keasbey, “The Courts and New Social Questions,” Maryland State Bar Association *Proceedings* (1911), p. 105.

² Dillon, *Laws and Jurisprudence of England and America*, p. 204.

tract" and to various doctrines of economic individualism. These ideas were prevalent and the semi-political views of the justices, meeting a responsive chord in public sentiment, as a rule, were received with popular approval. The change in the interpretation of the Fourteenth Amendment, whereby a content was declared involved therein which the majority of the Supreme Court had repeatedly held was not intended in its adoption, was the result of the reasoning of many justices, though a few of this number bore the brunt of the controversy which turned the tide toward a broad judicial review of legislation.

Three justices seem to have determined, in large part, the trend of the opinions of the Supreme Court, in the cases changing the meaning and content of the term "due process of law" and in ushering in a period characterized as a "carnival of unconstitutionality, which perhaps was at its height between 1890 and 1910."¹ They were Justices Field, Harlan, and Brewer. Certain peculiarities and characteristics of these justices made a distinct impression upon this unique feature of modern American constitutional law. Foremost of this group is Justice Field.

He had, we are told, a quality of intellect which led him on all occasions to seek for fundamental and universal principles.² His creative power, exhibited in a marked degree in his legislative career, was also characteristic of his decisions on the bench.³ His experience in a frontier community, as well as his training in early life, developed a philosophy of individualism in which he was disposed to encourage in every way individual self-exertion, and to object to measures attempting to regulate economic life.⁴ It was this philosophy that led

¹ Pound, "The Growth of Administrative Justice," *Wisconsin Law Review*, II (January, 1924), 327.

² George C. Gorham, *Biographical Notice of Stephen J. Field*, p. 63.

³ Gorham, *op. cit.*, p. 64.

⁴ Felix Frankfurter, "Twenty Years of Mr. Justice Holmes' Constitutional Opinions," *Harvard Law Review*, XXXVI (June, 1923), 909; Pound, "Liberty of

Justice Field to object strongly to any exercise of governmental power which to him seemed arbitrary,¹ and that impelled him to insist that the Fourteenth Amendment was designed to prevent arbitrary governmental acts.² More consistently than any other justice, he opposed the inclination of the justices of the Supreme Court not to give the broadest meaning and application to the due process and equal protection phrases of the Fourteenth Amendment. He was the spokesman of the court in some of the leading cases in which the interpretation of the amendment was changed, and continued on the bench until the reversal of the *Slaughter-House Case* and similar cases was accomplished, and until the amendment was interpreted as at least a negative protection to any interference with civil or political rights.³

Justice Harlan, like Justice Field, was influenced considerably by the philosophy and experience of the frontier, and he, too, was individualistic in much of his thinking. He was regarded as a "militant justice," and was strongly nationalistic in his political theories.⁴ Inclined to emphasize the theory of natural rights he was readily disposed to adopt the doctrine of fundamental rights which the justices of the Supreme Court were slowly developing in connection with the interpretation of the due process clause. He had supposed, he said, that the intention of the people of the United States was to prevent the deprivation of any legal right in violation of the

Contract," *Yale Law Journal*, XVIII (May, 1909), 454, 470; and *The Spirit of The Common Law*, p. 49.

¹ *Ex parte Wall*, 107 U. S. 265 (1882).

² *Bartemeyer v. Iowa*, 18 Wall. 129 (1873).

³ An able associate of Justice Field during the short term he served on the court was Justice Strong. He not only joined Field in his dissents condemning the legislative power to control property rights, but also became an advocate of the federalist doctrine favorable to the protection of vested rights, which, he claimed, "no matter how they arise, they are all equally sacred, equally beyond the reach of legislative interference." *Sinking Fund Cases*, 99 U. S. 700 (1878).

⁴ F. B. Clark, *The Constitutional Doctrines of Justice Harlan*, Johns Hopkins University Studies, XXXIII (Baltimore, 1915), 4, 15.

fundamental principles inhering in due process of law,¹ objected to any interference with private property rights,² and joined, as a rule, Justice Field in protesting against the regulative measures of the state legislatures. He agreed with Justice Field that Congress and the courts ought to be authorized to exercise a national control over civil rights.³

No greater exponent of the individualistic philosophy of this period was appointed to the Supreme Court than Justice Brewer.⁴ In decisions while on the circuit court, and in his opinions and influence on the Supreme Bench, he availed himself of every opportunity to defend the extreme individualistic doctrines which prevailed at this time. His point of view was expressed quite freely in an address delivered before the graduating class of the Yale Law School in June, 1891, on "Protection to Private Property from Public Attack." Referring to the Declaration of Independence and the bills of rights of state constitutions, Justice Brewer said, "they equally affirm that sacredness of life, of liberty, and of property, are rights, inalienable rights, anteceding human government, and its only sure foundation, given not by man to man, but granted by the Almighty to everyone, something which he has by virtue of his manhood, which he may not surrender and of which he may not be deprived." To Justice Brewer, the Declaration of Independence was the cornerstone of the federal Constitution.⁵

¹ *Taylor v. Beckham*, 178 U. S. 548, 601 (1899), and *Clark, op. cit.*, p. 75. "The doctrine of legislative absolutism is foreign to free government as it exists in this country," thought Justice Harlan. *Ibid.*, p. 609.

² *Norwood v. Baker*, 172 U. S. 269 (1898).

³ *Clark, op. cit.*, p. 144.

⁴ Justice Hough comments on the changing personnel at this time which brought to the court in Justice Brewer "a powerful reinforcement of the school of Field." *Harv. Law Rev.*, XXXII, 228.

⁵ Obviously this was not thought to be the case with those who drafted the instrument, or those who directed political affairs when it was put into operation. Nor was this belief prevalent among the federalist leaders who controlled the government during the fifty odd years that this party was in power in one or more branches of

Justice Brewer also asserted in his address that "the demands of absolute and eternal justice prevent that any private property legally acquired or legally held should be subordinated or destroyed in the interests of public health, morals, or welfare without compensation." The destruction of property rights, he thought, might be as effectively accomplished by the regulation of charges, or by the regulation of the use to which property may be put as by the direct destruction of the property itself. Referring to the controversy before the Supreme Court, which resulted in the reversal of the case of *Munn v. Illinois*, he approved Justice Blatchford's opinion for reversal with the comment that it "will ever remain the strong and unconquerable fortress in a long struggle between individual rights and public greed. I rejoice to have been permitted to put one stone into that fortress." He approved the doctrine of Chancellor Kent and of Justice Cooley that legislatures may not disturb vested rights, whether constitutional provisions prohibit such acts or not, and regretted that the Fourteenth Amendment had not been interpreted more favorably in the direction of protecting property rights. The frontier individualistic philosophy of Justices Field and Harlan had an able defender in Justice Brewer.

Appointed to the court after the change in the interpretation of the Fourteenth Amendment was under way, Justice Peckham was well suited to become one of the leading exponents of the conservative and individualistic thinking of Justices Field, Harlan, and Brewer. As a member of the Court of Appeals of New York, Justice Peckham not only approved the doctrine of Justice Field that the due process clause comprehended the inalienable rights referred to in the Declaration of Independence but he also indicated his in-

the federal government. It remained for the period after the Civil War, and for such defenders of the individualistic faith as Justices Field and Brewer, to discover that the Declaration was the cornerstone of the Constitution. See Carl Becker, *The Declaration of Independence* (New York, 1922).

clination to join the ranks of the *laissez faire* school and to look with disapproval on the increasing tendency to regulate economic conditions. When placing the stamp of disapproval on a state law prohibiting the giving of a gift or reward with the sale of an article of food, Justice Peckham said:

It is evidently of that kind which has been so frequent of late, a kind which is meant to protect some class in the community against the fair, free, and full competition of some other class, the members of the former class thinking it impossible to hold their own against such competition, and therefore flying to the legislature to secure some enactment which shall operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing field.¹

The natural inclination here expressed to hold the legislative power within "reasonable" limits qualified Justice Peckham to become the spokesman for the majority in *Lochner v. New York* and to assert that

it must, of course, be conceded that there is a limit to the valid exercise of the police power of the state. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty?²

And on this ground it was held that a particular limitation of the hours of labor did not come within the police power.³

Since the controversy which resulted in changing the meaning of the due process clause was an issue primarily between the liberal or radical groups and those imbued with the principles and philosophies of individualism and of conservatism, the ordinary partisan affiliations of the justices did not have

¹ *People v. Gillson*, 109 N. Y. 389, 398, 399 (1888).

² 198 U. S. 45 (1904).

³ For approval of the doctrine of this case see the opinion of Justice Sutherland in *Adkins v. Children's Hospital*, 261 U. S. 525 (1922).

a controlling influence in bringing about the change. The majority of the justices who gave a narrow interpretation to the amendment in the decade from 1870 to 1880 were Democrats, a number of whom, as supporters of the Union, had joined the Republican Party. It was Justice Miller, however, a Republican, and an intense partisan who usually supported federalist doctrines, who rendered the opinion of the majority in the *Slaughter-House Case*, and it was Justice Field, a Democrat, who gave the minority opinion and pleaded for a broad interpretation of the amendment. Justice Bradley, a Republican, protested strongly against judicial review of the legislative power of rate-making and of public utility regulation. And the effective shift favorable to judicial review of the regulation of public utilities in the *Minnesota Rate Case* of 1889 was accomplished with three Republicans and three Democrats forming the majority and two Republicans and one Democrat the minority. Though the majority of the justices from 1870 to 1900 were Republicans, Democrats joined with Republicans in many decisions extending the general terms of written constitutions and in construing implied limits on legislatures. The truth of the matter is that, except for some of the differences between the parties left over from Civil War times and the tariff controversy, leading Democrats and Republicans looked at political matters from similar viewpoints. The parties seldom took sides on the vital issues of the day, and, as a rule, their leaders joined in helping to bring about a covert but effective revolution in federal and state constitutional interpretation.

The federalism of Marshall, Kent, Story, Cooley, and Dillon suggested ideas and formulated principles for a political conservatism which American constitutions were presumed to foster. It remained for the justices of the Supreme Court, aided by a group of assertive state justices, to turn these ideas into the channels of a new conservatism and to com-

plete a structure of constitutional limitations and inhibitions the mere outlines of which had been previously sketched. The vested rights doctrine and the implied limitations originally considered as necessary for the protection of such rights took on a new form and were rounded out and extended by giving new meaning and content to the contract clause, to the just compensation principle for eminent domain proceedings, to the public purpose requirement for taxation, and to due process of law rendered applicable to all forms of legislative and administrative action, and particularly in so far as property rights might be affected.

In New York the total number of acts or parts thereof invalidated from 1783 to 1905 was three hundred and sixty-three. From 1860 to 1905 the number was two hundred and ninety-seven and more than one third of this number was declared void in the decade from 1891 to 1900.¹ Massachusetts courts used their powers sparingly to review and invalidate acts, only fifty-three acts or parts thereof being set aside to 1915. Ten of these were held void prior to 1860 and fifteen in the decade 1891 to 1900.²

But more important than the marked increase in the statutes invalidated in the latter part of the nineteenth century is the basic reason for such a change. Professor Corwin attributes the extension of judicial review in New York to the increase in the legislative product, the greater detail of constitutional provisions, and the development of constitutional doctrine, but he concludes that "the heart and soul of constitutional limitations in New York, thanks especially to Chancellor Kent, has been the doctrine of vested rights" and that the New York courts did constructive work in utilizing the

¹ See Edward S. Corwin, "The Extension of Judicial Review in New York," *Michigan Law Review*, XV (February, 1917), 285.

² James M. Rosenthal, "Massachusetts Acts and Resolves Declared Unconstitutional by the Supreme Judicial Court of Massachusetts," *Massachusetts Law Quarterly*, I (August, 1916), 303 ff.

"due process of law" clause as "a safe vehicle for the doctrine of vested rights."¹ Nearly one half of the statutes invalidated in Massachusetts was held in violation of due process of law or other provisions of the constitution which were construed as favorable to the protection of vested rights.² Evidently the justices had strayed a long way from the landmarks established in early precedents supporting the power of judicial review of legislative enactments.³

The obvious results of all the implied limitations and correlative ones, which have amplified and extended the scope of judicial review of legislation, and the extraordinary expansion of due process of law into a general limitation applicable to the entire realm of legislation and administration led to a construction by judicial interpretation of a broad rule of reason as a standard to test the fairness and reasonableness of legislative enactments, and incidentally to consider the wisdom or expediency of many governmental acts. The justices, however, continued to render lip service to the adage that courts had nothing to do with the wisdom or policy of legislation, their sole duty being to apply the express language of written constitutions. But express constitutional limitations with such vague terms as "due process of law" gave justices a roving commission to disapprove such measures as seemed to them to change too abruptly some regulation affecting the existing social or political order, or to presage too radical

¹ Corwin, *op. cit.*, pp. 303, 304.

² Rosenthal, *op. cit.*, p. 317.

³ Justice Woodward commented on the caution of the courts prior to the Civil War in exercising the right to invalidate acts in Pennsylvania as follows: "For nearly fifty years of our political existence under the Constitution of 1790, no act of assembly was set aside for unconstitutionality; judges claimed the power, and said they would exercise it in clear cases, but in all that period no case arose which in their judgment, was clear enough to justify the exercise of the power; and it is well known that that great light of this bench so recently extinguished [Chief Justice Gibson] stood opposed for many years to the existence of any such power. Since the Constitution of 1838 was adopted several acts of assembly have been declared unconstitutional, but they were all clear cases." *Sharpless v. Mayor of Philadelphia*, 21 Penna. St. 148, 183 (1853).

tendencies, and to seek refuge for such disapproval behind the indefinite language of express constitutional terms.¹

It is not so much, then, the original language or intent of written constitutions that is responsible for the unique character of the practice of judicial review of legislative acts in the United States, as compared with a similar practice in foreign countries. It is the judge-made constitutional doctrines supported by the conservative groups of the country and fostered by the extreme individualism of leaders of industry and finance who, while busily engaged in securing governmental favors, were solicitous to make sure that popular assemblies might not be permitted to regulate too freely their property or contract rights.

It is coming to be better understood today than formerly that methods of thinking fostered by the common law, supported by the capitalists and industrial leaders of the country, and applied by conservative-minded judges, rather than constitutional provisions have given the peculiar trend to judicial review of legislation in the United States. Though foreign critics of the American system of government have frequently pointed out this fact, none has recognized it more clearly or dealt with it so convincingly as Professor Edouard Lambert, of the University of Lyons. In a recent volume dealing with certain phases of the problem of judicial review of legislation, he contrasts the early period of the exercise of this power by American courts — when the object was to control the competency of the legislature to deal with certain subjects, and not the way in which the legislature had dealt with the subjects — and the modern practice of judicial review through which due process has been interpreted to form a new Magna

¹ Dr. Mott thinks the courts regard the Fourteenth Amendment as "a constitutional ideal." *Due Process of Law*, p. 360. This is equivalent to the view that the amendment is used to write into the fundamental law the ideals which the justices believe ought to prevail. According to Justice Holmes due process of law ought not to become "a pedagogical requirement of the impracticable." *Dominion Hotel v. Arizona*, 249 U. S. 265, 268 (1918).

Carta "built piece by piece by the judges to protect the free play of individual energies against the arbitrary manifestations of popular sovereignty."¹

In the twentieth century, Professor Lambert observes, the American judiciary is in possession of a power which permits it to exercise an energetic tutelage over the legislature, and to check the progress of legislation. This tutelage, he finds, is exercised in passing on the reasonableness of legislative measures, a well-known rule of reason now applied extensively by federal and state courts; and second, the criterion of expediency by which the courts pass on the economic value or political desirability of legislative measures. In the application of these principles, Professor Lambert thinks that American courts applying the conservative principles of the common law hold legislative activities within well-defined bounds. This practice of the courts, he believes, has had the result to erect a political judiciary against a political legislature, and often in conflict with it on the most irritating questions of a changing political and economic order. It is not surprising to find, then, that it operates to the detriment of the popularity and confidence ordinarily belonging to courts of justice.² The justices having taken sides on some of the fiercely contested political issues could expect nothing less than that their decisions would involve the courts in the maelstrom of party politics.

What is arbitrary and what is beneficent must be decided by common sense applied to a concrete set of facts.³ But

¹ *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Paris, 1921), pp. 32, 33, 41; also pp. 220, 221. See also, Edouard Lambert and Halfred C. Brown, *La lutte judiciaire du capital et du travail organisés aux États-Unis* (1924).

According to Professor Powell the "law of constitutional due process is therefore as much judge-made law as any common law is judge-made law." "The Judiciality of Minimum Wage Legislation," *Harv. Law Rev.*, XXXVII, 545, 546.

² Lambert, *op. cit.*, pp. 53, 55, 60.

³ Cuthbert W. Pound, "Constitutional Aspects of Administrative Law," in *The Growth of American Administrative Law* (St. Louis, 1923), p. 103.^a

what criteria except their own consciences, have judges to guide them, as to what acts are unreasonable, unfair, discriminatory, outrageous, capricious, and shocking to the moral sense of mankind? Is it surprising that the judgments of the individual justices differ widely as to the application of such vague and indefinite terms, that dissenting opinions are prevalent, that the courts frequently shift their positions, and that a feeling of uncertainty prevails as to the application of the rule of reason or the higher law philosophy supposed to be comprehended in the Fourteenth Amendment?

When legislation carefully formulated to deal with the complications and adjustments of the social order and to remedy some of the insistent evils of present industrial conditions is declared of no effect by a divided court, against the earnest and caustic protests of the minority justices, in the application of subjective criteria which constitute no standards at all, it is not strange that confidence in the judiciary is weakened, and that the leaders who are seeking to regulate more effectively the economic conditions which are deemed detrimental to human welfare are disposed to protest against the unwarranted powers assumed by the judges. "Here is the whole story behind the failure of all formulae connected with 'due process' and all the meaningless and circular statements as to what acts are and what are not 'due process.' In determining whether an act has a substantial and rational or reasonable relation to the enumerated matters, the court has in mind the background of 'fundamental principles' which are beyond the reach of any legislative power."¹ But is it not natural to expect that those for whom the oracles expound the "fundamental principles" should believe that the voice of the numen is not always correctly understood and that in the process of exposition some of the power once thought to

¹ A. M. Kales, "'Due Process,' the Inarticulate Major Premise and the Adamson Act," *Yale Law Jour.*, XXVI (May, 1917), 519.

belong to the people or to their representatives has been silently and surely dissipated? ¹

2. *Underlying Purpose of the Revival of the Natural Law Philosophy in American Constitutional Law.* American constitutions were drafted when there was a deep-seated conviction that the people could not be trusted and that well-defined checks must be placed upon the rule of the people. It was under these conditions that the courts with strong popular approval asserted the right, which they held to be implied from the language of the written constitution, to declare void legislative acts deemed to be in conflict with the written fundamental law. A growing distrust for legislative assemblies encouraged the courts not only to hold invalid acts regarded as contrary to the express language of the written constitutions, but to construe implied limitations supposed to be derived from the doctrine of natural and inalienable rights and from the notion of fundamental individual rights. Again the courts were encouraged and supported in a continuous line of decisions, mostly rendered since the Civil War, to place other implied limits on legislative powers in addition to the varied list of express limitations added by vote of the people. By extending judicial review of legislation through the developing doctrine of protecting vested rights, through the change in the meaning of due process of law, to render it a general limitation on legislative powers, and through giving new force and meaning to the separation of power theory,² the courts have gradually assumed a general right of censorship over legislation to see that it is not arbitrary or unfair and that it does not violate any of the judicially construed "fundamental principles" of the social order. A mild and relatively unim-

¹ According to Stephen Leacock, "American democracy, having by its degradation of the legislature repudiated its first born child has set up for itself the Mystic Worship of Judicial Interpretation." "The Limitations of Federal Government," American Political Science Association *Proceedings* (1908), p. 51.

² Warren H. Pillsbury, "Administrative Tribunals," *Harv. Law Rev.*, XXXVI (February and March, 1923), 405, 583.

portant practice of judicial review of legislation for nearly a century has during the last few decades loomed up as the controlling feature of the American system of constitutional government.

The judicial power to declare laws unconstitutional gradually introduced a new concept of due process by expanding what the courts had been inclined to regard as the inherent limitations on legislative powers. The doctrine of inherent limitations on legislatures had been applied at first to the protection of vested rights. It was a different matter to insist in the name of due process of law upon an immunity of individual action from legislative control.

It was such Justices as Field, Harlan, Brewer, and Peckham in the federal courts and Justices Edwards, Comstock, and Denio in the state courts, the champions of a revived eighteenth-century individualism, of the policy of economic *laissez faire*, and of conservative political tendencies, who gave the natural rights or modern higher law doctrine the peculiar trend which now marks the process of constitutional interpretation in state and federal courts.¹ As upholders of individualistic and *laissez faire* doctrines in an age of unceasing legislative activities the courts were made censors of economic and social legislation under the higher law doctrine of American constitutional law — *the rule of reason*.

Being rather insecure as a basis for legislative limitations, the former doctrine held a precarious place in American constitutional law, especially when the tendencies were in the direction of the extension of popular control over all agencies of government. When, however, this doctrine was absorbed in the general phrases "due process of law," "equal protec-

¹ For *laissez faire* theories, see *People v. Coler*, 166 N. Y. 1, 16-18, 23-25 (1901), and *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 285-287, 293-295 (1911). The right to take property by will was held to be an absolute and inherent right in *Nunemacher v. State*, 129 Wis. 190, 198, 203 (1907); and the right of privacy was considered as "derived from natural law" by Justice Cobb in *Pavesich v. Life Ins. Co.*, 122 Ga. 190, 194 (1905).

tion of the laws," "public purpose for taxation," "public use for eminent domain," and "reasonableness," it was given the semblance of express constitutional sanction. Henceforth judges and lawyers could confidently assert that courts no longer passed upon the wisdom or expediency of legislative acts. They merely applied in a mechanical way, it was insisted, the express words of the constitution which by "indubitable demonstration" compelled the laying of the axe at the root of legislative power. This change in basis has not affected the character of the higher law doctrine which constitutes today *the central feature of American constitutional law*. A new law of nature and a new rule of reason were in process of development. Instead, however, of serving as in Roman and in mediaeval times, as an agency for the liberalization of the law, as an ideal toward which law was approximating, it became the weapon of a fixed, immutable order which was designed to serve as a check on progressive or radical measures, and to restrict within well-defined limits the liberalizing tendencies which were characteristic of an age of extensive lawmaking.¹

The repeated assertions, then, by lawyers and judges in the United States that the right to hold laws invalid because they are unwise or unjust, or because they run counter to natural and inalienable rights, have never been applied to concrete cases, may readily be explained.

Before the extensive implications of due process of law and other similar phrases had been discovered, it was not uncommon for justices to refer to fundamental principles or natural

¹ Speaking of the dangers of socialism and communism, Mr. Guthrie says, "Much is to be dreaded and guarded against in the despotism of the majority wielding and abusing the power of legislation, and ignorantly or intentionally undermining the foundations of the Constitution itself . . . the Fourteenth Amendment is the bulwark on which we place our reliance." *Lectures on the Fourteenth Amendment to the Constitution of the United States*, pp. 30, 31. He admonishes the lawyers "to realize their duty to teach people in season and out of season to value and respect individual liberty and the rights of property." *Ibid.*, p. 32.

rights as a basis to invalidate acts. Before the Civil War, when, on the whole, relatively few acts were held void by the courts, certain of the decisions invalidating acts were based definitely upon the doctrine of fundamental rights, the principles of free government, or other implied limitations related in a sense to the higher law philosophy. Sometimes constitutional provisions were held applicable; other times there seemed to be little inclination to seek for appropriate constitutional sanction other than the general clauses in the bills of rights.¹ But the reason why it is claimed that the courts have not been passing upon the wisdom or unwisdom of acts under a natural rights doctrine is due to the fact that the due process clause was interpreted to include and embody such a doctrine. From that time on, instead of referring to these general limitations as inherent in all governments, or to the older theories of natural law, the courts began to refer to "due process of law," "equal protection of the laws," and other general terms interpreted to include natural and inalienable rights.

When it is contended, then, that the courts do not pass upon the wisdom or unwisdom, policy or impolicy, the reasonableness or unreasonableness of legislative acts it merely means that in the determination of whether an act is or is not due process of law there is involved the full content of the old doctrine of natural and inalienable rights, of the principles of the social compact, and of the former dogmas of free republican governments, all of which involved questions of political expediency.² Having brought the straggling and insecure phrases of "natural law" or "natural justice" and of the

¹ For a summary of leading decisions, see "The Law of Nature in State and Federal Judicial Decisions," *Yale Law Jour.*, XXV (June, 1916), 617.

² In declaring a law unconstitutional, a court must necessarily cover the same ground which has already been covered by the legislative department in deciding upon the propriety of the enactment. Cooley, *Constitutional Limitations* (8th ed.), I, 334.

"fixed principles of republican governments" into due process of law it was confidently asserted that all decisions of the courts dealing with the validity of legislative acts were based upon the *express provisions* of written constitutions.¹

The conclusion of the matter seems to be that beginning with the eighteenth-century notions of natural rights and of limiting and dividing powers, the states of the American union turned in the direction of unrestricted powers in the hands of the legislative bodies, and then adopted the policy of placing larger and more effective limits upon legislatures. The reason for this can be found largely in the belief that legislatures had unduly interfered with property rights and in the fear that property and contracts were not safe unless many restrictions were imposed upon representative bodies.

The courts, having invaded the legislative domain by the interpretation of the general terms of the Fifth and the Fourteenth Amendments, in determining whether legislation is in effect wise, expedient, or reasonable in its object, we are now advised that it is futile to criticize what has been done. It is asserted to be a "question of purely academic interest" whether the court's version of due process of law was historically correct.² The only profitable study is declared to be when and under what circumstances does the amendment

¹ "The Justices of the United States Supreme Court have taken counsel together regarding the present political tendencies, so far as they seem to the Justices to menace the Constitution, and have determined that upon the Supreme Court rests the burden of standing between the Constitution and popular passion." Quoted by Richard Olney, in "Discrimination against Union Labor — Legal?" *American Law Review*, XLII (March–April, 1908), 161; sec. 43 Cong. Rec. Pt. I, 20–22, message of President Roosevelt.

The change in the meaning of the terms "liberty" and "property" as used in the Constitution from the narrow implications of physical liberty and property to economic liberty, was "the reflection in the minds of the judges of the business revolution which followed the extension of markets and the political revolution that liberated the slaves." John R. Commons, *Legal Foundations of Capitalism*, p. 283.

² Ray A. Brown, "Due Process of Law, Police Power, and the Supreme Court," *Harv. Law Rev.*, XL (May, 1927), 947. Cf. emergence of the court's doctrine through Slaughter-House Cases, 16 Wall. 36 (1872); *Bartemeyer v. Iowa*, 18 Wall. 129 (1873); *Missouri Pacific Ry. v. Humes*, 115 U. S. 512 (1885), and *Mugler v. Kansas*, 123 U. S. 623 (1887).

serve as a restriction on the states. Though the meaning now given to due process of law requires the courts to deal with problems of legislative policy it is thought to be idle "to criticize the courts for invading the field of policy in deciding 'due process' cases. There is nothing else that they can do as long as the doctrine prevails that these clauses limit the subject matter of legislation. This might as well be frankly recognized by all concerned." ¹

Such legal pessimism is indefensible. It is equivalent to saying that when judges choose to take from the people their right of self-government with no express sanction for such action, there is no remedy but servile submission. It is possible to amend the Fourteenth Amendment and if the trend of the past thirty years continues, sufficient groups and interests will be confined by its limitations to create a sentiment which will render its alteration possible. Whether such a radical step be desirable or not, the bringing of constant pressure on the court through all the available avenues of public opinion may secure a reversal of some decisions which have proved most obnoxious. It does not seem impossible to secure on the federal bench judges whose training and experience, according with the prevailing sentiment of the community, may decide that the historic theory of the separation of powers is still valid and applies to judges as well as to other officers, and hence, that matters of social, economic, and political policy belong of right to the legislative branch of the government. Due process of law might then be retained in somewhat of its original meaning as a limitation on procedural matters. If, as Professor Powell observes, the vital matter in the interpretation of the due process clause of the Constitution is not one of economics, of law, or of public policy, but of the arbiters who ultimately decide cases,² is it not time that more atten-

¹ Henry Rottschaefer, "The Field of Governmental Price Control," *Yale Law Jour.*, XXXV (February, 1926), 438.

² Thomas Reed Powell, *op. cit.*, p. 545.

tion be given to the selection of the arbiters and to the influencing of their work as final interpreters of the fundamental law? As the repeal of the Fourteenth Amendment is a remote contingency, the concentration of public attention in the direction of confining judges to their normal function of deciding cases involving private rights in accordance with previously determined legislative policies, rather than of determining the wisdom or expediency of public policies, seems the only practical procedure. Though it offers small hope of immediate relief for those who chafe under the restrictions which now interfere with advances along the lines of social and industrial reconstruction, at least it gives an objective for the present to take issue with the supporters of the *status quo* and the juristic pessimism which they espouse.¹

3. *Types of Natural Law applied in the United States.* During the nineteenth century natural law theories were applied in the United States by different groups for a variety of purposes. There were occasional references to the divine sources of law and to natural laws emanating therefrom which were binding upon all men. In the early decades of the nineteenth century the justices frequently made use of natural law as a liberalizing and creative concept similar to its use in Roman times and in the later mediaeval periods. But its use was creative only in the sense that it facilitated the borrowing of legal precepts from European legal systems. Conceived as a body of rational principles of which actual legal rules were only declaratory, the natural law philosophy, Dean Pound thinks, "was at its best when courts were called on to utilize the peculiar social and political institutions of pioneer America in developing and supplementing the legal mate-

¹ The real object at present of the due process clauses of the federal Constitution is to enable the Supreme Court to determine whether acts of Congress or of the state legislatures are reasonable. Cf. Willis, *op. cit.*, pp. 338, 339. Mr. Willis suggests an addition to the Fourteenth Amendment to the effect that the due process clause shall not be interpreted to include matters of substantive law. *Ibid.*, pp. 343, 344.

rials afforded by the English common law, the Continental treatises on commercial law, and comparative law.”¹ When an attempt was made to put judicial decisions in the fields of international law or of constitutional law into a philosophical mold, the law of nature theories of Grotius, of Pufendorf, of Vattel, or of Burlamaqui were given a meaning suitable to the legal and political conditions of the time. At times natural law as a basis of natural rights might be identified with the rights and duties of an abstract man in a state of nature or perchance with the immemorial common law rights as formulated by Coke and Blackstone. It might also serve to modify a rigorous rule of the formal law. “The American variant of natural law was especially an outgrowth of the review of legislative acts by the courts and the efforts of the justices to deduce general principles of constitutional law from the social compact, from the nature of free government, or from the fundamental and inalienable rights of the individual.”²

In the hands of American judges natural law ideas were a favorite refuge for giving sanction to the negative and restrictive ideas of the eighteenth century that governmental functions should be confined to a narrow sphere. They formed the background for the American doctrine of civil liberty, the chief purpose of which is to safeguard individual rights and to place restrictions on political action to accomplish this end. A legal philosophy was fostered, the chief aim of which was to support the existing order or to recur to the past for standards to test the validity of new forms of legislation. This philosophy assisted in forming what foreign critics have called “the straight jacket” into which the powers of government had to fit or be denied validity.

These natural laws negative and destructive in effect acquired by the end of the nineteenth century a stamp of in-

¹ “The Theory of Judicial Decision,” *Harv. Law Rev.*, XXXVI (May, 1923), 808.

² Cf. Pound, *An Introduction to the Philosophy of Law* (New Haven, 1922), pp. 50-52.

exorability. They placed certain legal phenomena beyond the realm of conscious human control and bred a philosophy of juristic pessimism, which accords well with the practices and beliefs of those who seek protection but not interference with their "private" affairs. They became obstacles to the growth and improvement of the law.

American constitutional law is saturated with natural law ideas. The old law of nature was crystallized into certain standard formulae in the bills of rights in state and federal constitutions and then was given renewed vigor in the construction of the general phrases which were made a part of the fundamental law. Formerly when the statute, code, legal procedure, or some formal rule in the administration of the law proved to be arbitrary and unreasonable the law of nature was appealed to as an ideal law to require a modification of the harsh or unfair rule or to have it set aside as void. The new law of nature formulated by the justices in American courts affirmed certain standards of reasonable and fair conduct on the part of government officers which were presumed to be fixed in the fundamental written law through such terms as "due process of law" and "the equal protection of the laws." When legislators and executives undertook to enact or enforce rules or laws to ameliorate some of the inequities or inequalities in the existing economic or social order, to regulate conduct in the interest of classes which are deemed to require special protection, or to regulate and restrict uses of property in what is deemed to be the public interest, the justices scanned these acts to see whether they were within the confines of reasonable and fair conduct as were supposed to be rendered fixed and unalterable in the written constitution.¹

¹ "The objection to this view is that the court must judge by a standard of fairness that is not, and could not be, definitely expressed in the Constitution. This, of course, is the fundamental difficulty in all due process cases. Groping for some standards, the courts are tempted to revert to the old language of natural rights, as though such rights were an over-law above the Constitution itself." Note on the case of *Moore v. Dempsey*, *Harv. Law Rev.*, XXXVII (December, 1923), 250.

As a matter of fact, then, natural law flourishes in the United States despite the insistence from many quarters that it belongs in the realm of exploded vagaries.¹ But judges and courts are applying an historical *Naturrecht* derived from the principles and precedents of the common law and modified by the individualist natural law of the eighteenth century.² Insistent efforts are made to deny the use of general principles or standards based on natural law reasoning and fictions are used to conceal the process. It is futile, however, to refuse to face the facts, and "to hide from ourselves the general principles which we do in fact follow, and to delude ourselves into the belief that we have no philosophy."³

4. *Natural Law Theories as a Sanction for American Political and Legal Conservatism.* It is obvious that natural law thinking of various types has played a significant rôle in the growth of private and public law in the United States. There have been in this growth new applications of the principles of fair conduct for a fiduciary, of reasonable conduct in the law of negligence, of fair competition in business transactions, and of fair value and reasonable return in public utility con-

"No state can make or enforce any laws which shall, upon proper proceedings, be deemed unreasonable by a majority of the Supreme Court . . . the rule of reason alone governs. What are fair profits, what are excessive taxes, what are proper health laws, what is confiscation and what discrimination; — these are questions which cannot be answered in the abstract, nor can they be adequately defined by precedents." Collins, *The Fourteenth Amendment and the States*, p. 109.

¹ "All nineteenth century theories of judicial decision," says Dean Pound, "in one way or another grow out of the natural law thinking of the seventeenth and eighteenth centuries." "The Theory of Judicial Decision," *Harv. Law Rev.*, XXXVI (May, 1923), 802.

² Cf. Pound, *The Spirit of the Common Law*, p. 37. "With us the basis of all deduction is the classical common law — the English decisions and authorities of the seventeenth, eighteenth and first half of the nineteenth centuries. Our jurists have made of this a very *Naturrecht*. They have asked us to test all new situations and new doctrines by it. . . . More than this, through the power of courts over unconstitutional legislation and the doctrine that our bills of right are declaratory, courts have forced it upon modern social legislation." Pound, in *Harv. Law Rev.*, XXIV (June, 1911), 601.

³ M. R. Cohen in Introduction to Pierre de Tourtoulon, *Philosophy in the Development of Law*, trans. by Martha Read, Modern Legal Philosophy Series, XIII (New York, 1922), 24.

trol. And in public law the use of natural law theories for various purposes has been continuous from colonial times to the present day. Conceived in the spirit of democracy and liberalism, these theories gave sanction to those who attacked the existing legal order and who through revolution gained the independence of the American states. Throughout the early periods of American history the natural law doctrines were employed mainly for idealistic, progressive, and revolutionary purposes.

But the first stage in this development had not passed when similar doctrines were approved in order to set limits to governmental action for ends that were conservative, aristocratic, and authoritarian. As the idealistic and progressive uses of natural law have declined the conservative and aristocratic uses have been extended. And it is in the review of legislation by the courts that the conservative, authoritarian type of natural law has been fostered. The most significant applications of such higher law ideas have arisen when the courts have become the constitutional censors of the acts of legislative and executive action, whether of federal or state agencies.¹

It is customary to assert that it is a sheer mis-statement to say that American courts in exercising judicial review of legislation assume a supervisory power over the legislative and executive branches of the government.² Such an observation had a modicum of accuracy when the courts held few acts invalid and then only because they were regarded in conflict with some clear and well-understood terms of a written fundamental law. Such is the review exercised as a rule over legislation by the Canadian courts and the Privy Council for

¹ "The influence of the conception of natural rights on legal development in the United States has been to support the position of a reactionary, dominant, propertied class." James Mickel Williams, *The Foundations of Social Science* (New York, 1920), p. 245.

² John H. Clarke, "Judicial Power to Declare Legislation Unconstitutional," *American Bar Association Journal*, IX (November, 1923), 691.

Canada and by the Australian courts. It is a different matter when the courts use phrases such as due process of law, equal protection of the laws, fair return and reasonable rates for use of property, acts not arbitrary or capricious or designed to shock the sense of mankind as grounds for review of legislation. These phrases, applied as they usually are to a complicated state of facts and used to test the validity of some act regulating economic or social relationships, take judicial review out of the inexorable and mechanical realm in which decisions follow indubitable logic. The reasoning regarding judicial review, which Hamilton and Marshall attempted to put on a plane of dry logic, fails either to justify or to explain the practice when based on indefinable general phrases.¹

An analysis of the different provisions of written constitutions shows that the courts have a variety of types of provisions to interpret. Some provisions, such as that all political power resides in the people, are political in character and cannot be tested by ordinary legal criteria. When the legislature is inhibited from passing bills of attainder or *ex post facto* laws or from interfering with individual rights by abolishing trial by jury in criminal cases there are available to judges for guidance in applying these provisions fairly definite legal precepts. But these semi-political provisions and the clauses relating to criminal trials have a relatively minor place in modern constitutional interpretation by the courts of the United States. For it is rather legal conceptions derived from the constitutions by interpretation such as the police power, liberty of contract and of calling, and the general require-

¹ For the claim that logic alone guides judges in reviewing the validity of legislative acts see opinion of Justice White, that "no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust." *McCray v. United States*, 195 U. S. 27, 54 (1904). "August as are the functions of the Supreme Court," says John W. Davis, "surely they do not go one step beyond the administration of justice to individual litigants." "Present Day Problems," *Amer. Bar Assoc. Jour.*, IX (September, 1923), 557.

ment that no one shall be deprived of life, liberty, or property without due process of law which now furnish the most important bases for the review of the validity of legislative acts. And here judges have no legal rules to guide them. Passing as they often do in these cases on the reasonableness of social legislation they are essentially dealing with legislative questions — not with a mechanical legal technique.

The problem of what ought to be law, what is reasonable, arbitrary, or fair, really is an exercise of veto power. As a matter of fact, the mechanical, necessitous doctrine which became a tradition in the early period of American constitutional law does not apply to the invalidating of acts on the ground of lack of fairness or reasonableness under the Fifth and Fourteenth Amendments of the federal Constitution or under similar provisions of the state constitutions.

The acute controversies on the interpretation of the federal Constitution for the last fifty years have arisen out of the interstate commerce and due process of law clauses. It has been repeatedly pointed out that the judgments of the court along these lines are primarily judgments on facts and only secondarily on the law. Concepts like "liberty" and "due process" are too indefinite to solve issues. They derive meaning only if referred to human facts.¹ "Here is where the great practical evil of the doctrine of immutable and necessary antecedent rules comes in," according to John Dewey, "it sanctifies the old; adherence to it in practice constantly widens the gap between current social conditions and the principles used by the courts. The effect is to breed irritation, disrespect for law, together with virtual alliance between the judiciary and entrenched interests that correspond most nearly to the con-

¹ Cf. Felix Frankfurter, "A Note on Advisory Opinions," *Harv. Law Rev.*, XXXVII (June, 1924), 1002, and especially list of cases turning on facts; also Henry Wolf Bickl , "Judicial Determination of Questions of Fact affecting Constitutional Validity of Legislative Action," *Harv. Law Rev.*, XXXVIII (November, 1924), 6.

ditions under which the rules of law were previously laid down.”¹

Only the misinformed or extreme partisans claim any longer that there was any necessity in the adoption of a written constitution, as John Marshall insisted, for courts to review the validity of legislative acts. Partisan feelings and self-interest also account for the failure to admit that much the more important phases of judicial review of legislation in the United States are the result of judge-made limitations designed to give legal sanction to conservative tendencies of the time. It is not surprising then to find conservative leaders insistent on the maintenance and extension of the powers of the courts. ““There are today,” said Justice Brewer before the New York State Bar Association,

ten thousand millions of dollars invested in railroad property, whose owners in this country number less than two million persons. Can it be that whether this immense sum shall earn a dollar or bring the slightest recompense to those who have invested perhaps their all in that business and are thus aiding in the development of the country, depends wholly upon the whim and greed of the great majority of sixty millions who do not own a dollar! I say that so long as constitutional guarantees lift on American soil their buttresses and bulwarks against wrong, and so long as the American judiciary breathes the free air of courage it cannot. . . . What then is to be done? My reply is, strengthen the judiciary.

Not only have the courts construed constitutional guarantees to protect the property interests of corporations but in an epoch-making decision the Supreme Court of the United States has also held that legislative and administrative agencies in regulating public utilities and in fixing rates must be subject to review by the courts on both the law and the facts in order that governmental action affecting utility properties may not be unreasonable and that their properties may not be confiscated. Such a decision has placed upon the courts

¹ “Logical Method and Law,” *Cornell Law Quarterly*, X (December, 1924), 26.

ultimately the examination of the intricate processes of the valuation of public utilities, the determination of what is a fair value of the property for rate making, what is a fair return on this valuation, and what is reasonable regulation. Thus great questions of legislative policy as to the regulation of utilities are carried to the courts and what the ultimate methods of regulation may be are determined by the standards which the justices lay down. Since courts are better qualified to protect property rights than to preserve individual privileges and the public good, the owners of public utilities have been encouraged to defy the authority of the government.

In recognition of the influence of personal and individual factors in the legislative activity of judges such standards as fair return, reasonable care, and due diligence are applied in England by administrative boards or by courts with a jury passing judgment on the facts. The English people have never accorded to judges the authority to determine the validity of legislative acts no matter how fundamental the rights of the individual which might be invaded. There is in this regard a striking difference between the practice of the English and of the American courts.

Because of the natural conservatism and the class bias of judges the English people have surrounded judicial legislation with definite limitations and have invariably preserved the corrective power of Parliament. The reasons for these checks on the legislative powers of the courts are thus expressed by two English commentators:

The courts or the judges, when acting as legislators, are, of course, influenced by beliefs and feelings of their time, and are guided to a considerable extent by the dominant current of public opinion; Eldon and Kenyon belonged to the era of old Toryism as distinctly as Denman, Campbell, Erle and Bramwell belonged to the age of Benthamite liberalism. But whilst our tribunals, or the judges of whom they are composed, are swayed by the prevailing beliefs of a particular time,

they are also guided by professional opinions and ways of thinking which are to a certain extent independent of and possibly opposed to the general tone of public opinion. The judges are the heads of the legal profession. They are advanced in life. They are for the most part persons of a conservative disposition. They are in no way dependent for their emoluments, dignity, or reputation upon the favor of the electors, or even of ministers who represent in the long run the wishes of the electorate. They are more likely to be biased by professional habits and feeling than by the popular sentiment of the hour. Hence, judicial legislation will often be marked by certain characteristics rarely found in acts of Parliament.¹

The habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgment as you would wish. This is one of the great difficulties at present with Labour. Labour says: "Where are your impartial Judges? They all move in the same circle as the employers and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?" It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class.²

When due process of law and the equal protection of the laws are under interpretation the determination of the issues involved depend "in large part upon the composition of the court of last resort at the particular time when the issue comes before it."³

¹ A. V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (New York, 1905), pp. 361, 362.

² Lord Justice Scrutton, "The Work of the Commercial Courts," *Cambridge Law Journal*, I, 6, 8. For the opinion that the House of Lords as a supreme judicial body is "in entire good faith, the unconscious servant of a single class in the community," see Harold J. Laski, "Judicial Review of Social Policy in England," *Harv. Law Rev.*, XXXIX (May, 1926), 848.

³ Powell, *Harv. Law Rev.*, XXXVII, p. 546. Combating the doctrine that the judges should be made the ultimate arbiters of all constitutional questions, Jefferson wrote: "This is a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. Our judges are as honest as other men and not more so. They have, with others, the same passions for party, for power and the privilege of their corps. Their maxim is 'boni judicis est ampliare jurisdictionem,' and their power the more dangerous as they are in office for life, and not responsible, as the other functionaries are, to the elective control." To William Charles Jarvis, Sept. 28, 1820; also to William Johnson, June 12, 1823.

Governments were in process of formation in the United States when eighteenth-century ideas of checking and dividing powers were uppermost in political thought. John Randolph thought it was necessary to base governments on the doctrine of original sin and the natural depravity of the human race and to devise restraints accordingly.¹ From such a philosophy there was evolved the dictum that what was desired was a "government of laws and not men" — or in English phraseology the supremacy of the laws.

Professor Dicey regarded the supremacy or rule of law as a characteristic of the English constitution and explained that "it means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government."² That there is a decline in the recognition accorded to the rule of law, Dicey recognizes.³ Coincident with this change in the English legal system there is a noteworthy effort to foster the sanctity of this rule as the central principle of constitutional government in the United States.

The doctrine of judicial review of legislative enactments is regarded as a practical and effective device to extend the rule of law. It has become part of the creed of those who desire to apply the rule of law to all spheres of government or to limit the omnipotent sovereign by a higher law either of a fixed and immutable kind or of a variable content. If Lord Acton is correct in the assertion that "the great question is to discover not what governments prescribe but what they ought to prescribe," jurists are likely to turn to the American prac-

¹ Cf. 10th Cong., 1st Sess. (Nov. 13, 1807), Jefferson also observed: "In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the constitution."

² A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed., London, 1915), p. 198.

³ *Ibid.*, Introduction, pp. xxxvi ff.

tice of judicial review of legislative acts as a practical means of enforcing the principles of a variable natural law, though few will favor the adoption of such a practice if a natural law of an eighteenth-century type is to be applied by justices who regard the principles of this law as immutable.

Denying that they are applying anything but the express terms of written constitutions the justices of higher courts in the United States have in effect created a *super-constitution*, a superior law which in certain respects is regarded as unchangeable by the people themselves. Safely intrenched as the sole interpreters of this *super-constitution* they have determined what is wise or unwise for the representatives of the people to undertake in the realm of political experiment.¹ When a type of political action is not liked it may readily be condemned as capricious or arbitrary or unreasonable.

The warnings of the great constitutional lawyer, James Bradley Thayer, however, may well cause us to ponder on the tendency to lean too heavily on the courts.

Great and, indeed, inestimable, as are the advantages in a popular government of this conservative influence, — the power of the judiciary to disregard unconstitutional legislation, — it should be remembered that the exercise of it, even when unavoidable, is always attended with a serious evil, namely the correction of legislative mistakes comes from the outside, and the people lose the political experience, and the moral education and stimulus that come from fighting the question out in an ordinary way, and correcting their own errors. If the decision in *Munn v. Illinois*, and in the "*Granger Cases*," twenty-five years ago, and in the "*Legal Tender Cases*," nearly thirty years ago, had been different; and the legislation there in question, thought by many to be unconstitutional and by many more to be ill advised, had been set aside, we should have been saved some trouble and some harm. But I venture to think that the good which came to the country and its people from the vigorous thinking that had to be done in the political debates that followed, from the infiltration

¹ "The American democracy in political and social matters is made to accord strictly with extreme conservatism and considers its foundation at the same time as an eternal divine moral and legal order." Ernst Troeltsch, *Naturrecht und Humanität in der Weltpolitik* (Berlin, 1923), p. 6.

through every part of the population of sound ideas and sentiments, from the rousing into activity of opposing elements, the enlargement of ideas, the strengthening of moral fibre, and the growth of political experience which came out of it all, — that all this far more than outweighed any evil which ever flowed from the refusal of the court to interfere with the work of the legislature.

The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.

What can be done? It is the courts that can do most to cure the evil; and the opportunity is a very great one. Let them resolutely adhere to first principles. Let them consider how narrow is the function which the constitutions have conferred on them, — the office merely of deciding litigated cases; how large, therefore, is the duty entrusted to others, and above all to the legislature. It is that body which is charged, primarily, with the duty of judging of the constitutionality of its work. The constitutions generally give them no authority to call upon a court for advice; they must decide for themselves, and the courts may never be able to say a word. Such a body, charged, in every State, with almost all the legislative power of the people, is entitled to the most entire and real respect; is entitled, as among all rationally permissible opinions as to what the Constitution allows, to its own choice. Courts, as has often been said, are not to think of the legislators, but of the legislature, — the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a coördinate department of the government, charged with the greatest functions, and invested, in contemplation of law, with whatsoever wisdom, virtue, and knowledge the exercise of such functions requires.

To set aside the acts of such a body, representing in its own field, which is the highest of all, the ultimate sovereign, should be a solemn, unusual, and painful act. Something is wrong when it can be other than that. And if it be true that the holders of legislative power are careless of evil, the constitutional duty of the court remains wholly untouched; it cannot rightly undertake to protect the people by attempting a function not its own. On the other hand, by adhering to its own place a court may help, as nothing else can, to fix the spot where responsibility rests, viz., on the careless and reckless legislators, and to bring down on that precise locality the thunderbolt of popular condemnation. The judiciary, today, in dealing with the acts of co-

ordinate legislatures, owes to the country no greater or clearer duty than that of keeping its hands off these acts whenever it is possible to do it. That will powerfully help to bring the people and their representatives to a sense of their own responsibility.¹

Under no system, Thayer thinks, can the courts go far to save the people from ruin. We are much too apt to think of the judicial power of disregarding acts of the other departments as our only protection against oppression and ruin. But it is remarkable how small a part this played in any of the debates on the federal Constitution. The chief protections were a wide suffrage, short terms of office, a double legislative chamber, and the so-called executive veto.²

The judges have insisted that when in doubt the courts should interpret constitutional provisions favorable to legislative powers. If this principle had been followed there would have been scant foundation for the construction of implied limitations on legislatures; and due process of law would have had slight effect on substantive legislative powers. Numerous opinions of the Supreme Court give indisputable evidence that the Fourteenth Amendment need not have been interpreted so as to greatly narrow the field of state legislation. A continuous line of dissents by the justices of the court in due process cases indicates that on a fair interpretation of the language of the amendment the states might have been allowed much greater freedom in the realm of social and economic legislation. The distinction is sometimes not clearly recognized that the construction of an implied power doctrine by which constitutional provisions are adapted to new conditions is justifiable as a principle of legal growth, whereas the interpretation of a doctrine of implied limitations as a means to retard and confine legal development is indefensible.

¹ Thayer's *Marshall*, pp. 103, 110, and *Legal Essays* (Boston, 1908), pp. 39-41.

² *Ibid.*, p. 64; *Legal Essays*, pp. 11-12. For weaknesses of Marshall's reasoning in the *Marbury* Case, consult Thayer, *Legal Essays*, p. 15.

Though the religious and metaphysical concepts of natural law, since the eighteenth century, have had relatively slight influence in the growth of law in the United States, natural law as an ideal has been a not insignificant factor in the minds of judges and legislators as they were molding into a system the legal materials at hand so as to meet the social, economic, and political conditions of the day. And at the time that the theories of the Positivist School of jurisprudence were prevailing, which denied the potency of any natural law ideas, a pragmatic trend in American legal philosophy was giving a new turn to the application of natural law theories. When, through the prevalence of pioneer ideas and ideals, governments were made more democratic and were gradually encouraged to extend their control over many heretofore unregulated phases of economic life restraints were sought to place restrictions on the zealous activities of popularly elected representative bodies. It was then that the moral obligation to govern reasonably and justly was translated into legal phraseology by means of the old common law precept — due process of law.

But instead of conceiving the moral duty to govern reasonably as an ideal to which law was expected to conform in meeting the needs of a growing community as conditions changed, it was thought of as a standard to protect the interests of certain classes. Due process of law was to accord justice not as required by the varying conditions of an increasingly complex economic life but justice designed to make more secure the property or other interests of those entrenched in power. By requiring certain formal criteria for all legislative and administrative action the *status quo* economically would not be too rudely or radically disturbed. Social and economic conditions might be regulated within limited areas as long as due care was taken to leave certain classes of property rights undisturbed. Due process of law

became the weapon for the application of a class reason and a class justice.¹

Building on the foundations of Wilson, Hamilton, Marshall, and Webster, Justices Chase, Kent, Story, Cooley, with the aid of other justices in state and federal courts, constructed a check which the conservative classes were demanding. In applying Marshall's notable dictum that this was "a government of laws and not of men" a criterion was evolved by which judges exercised a selective process as to what were, in their judgment, properly called "laws" and in this selective process the courts had in mind "a background of fundamental principles" which are beyond the reach of any legislative power.²

The modern American theories of natural law embodied as integral parts of constitutional due process of law and equal protection of the laws are essentially theories in terms of "the self-interest of the socially and economically dominant class." Former theories, which were used to good advantage when the English common law and the principles of Continental law were adapted to the conditions of pioneer rural American conditions, have become obstacles to change, devices to sanctify the existing legal order, and sanctions for the mainte-

¹ Speaking of the theories which justices have read into the Fourteenth Amendment, Dean Pound says, "A theory that legislators and courts are but the mouth-pieces through which the dominant class makes its will effective, a theory of law in terms of the self-interest of the socially and economically dominant class, a theory that the jurist may do no more than observe and record the phenomena of the transitional stage of hopeless conflict while one class is gaining the upper hand at the expense of its predecessors in the economic and social order — such a theory is more threatening to the general security than any of the recent modifications and adaptations of the atomistic individualism of the eighteenth century of which recent legislation has been so fearful." *Harv. Law Rev.*, XXXVI (May, 1923), 824. See also G. C. Henderson, *The Position of Foreign Corporations in American Constitutional Law* (Cambridge, 1918), p. 163.

² A. M. Kales, *op. cit.*, p. 526.

Referring to the decisions of the Supreme Court in the *Hitchman* and *Coppage Cases*, Professor John R. Commons says, "It is the judge who believes in the law and custom of business and not the judge who believes in the law and custom of labor, that decides." And, he notes, it is not logic but beliefs which are the determining factors in such decisions. *Op. cit.*, p. 298.

nance of the *status quo* in the regulations of economic and social conditions.¹

APPENDIX

The avowed use of reasonableness and other concepts related to natural law by the Justices of the Supreme Court of the United States in a single year (October term, 1924) demonstrates the prominent place such ideas have acquired in federal constitutional interpretation.

The fee fixed by a state act is *arbitrary* and the number of shares is not a *reasonable basis* for the classification of foreign corporations for the determination of an annual fee.²

There is no suggestion of a *flagrant abuse* or *purely arbitrary* exercise of taxing power.

The Court will review a case only when there is a question of law or when action under a law is "*clearly arbitrary or capricious*."³

An assessment is not *inherently arbitrary*—no *unreasonable* result.⁴

State assessments are valid unless "*palpably arbitrary* or a *plain abuse* of power" or result in a "*manifest and unreasonable discrimination*."⁵

The action of a state utility commission must not pass beyond the bounds of what is *reasonable* and *suitable*.⁶

The order of a utility commission is not "*inherently arbitrary*."⁷

An award of the Secretary of the Interior is held not "*arbitrary or capricious* or fraudulent or an abuse of discretion."⁸

¹ Cf. Pound, "The Theory of Judicial Decision," *Harv. Law Rev.*, XXXVI (May, 1923), 808, 824.

² *Airway Electric Appliance Corporation v. Day*, 266 U. S. 71.

³ *Missouri Pacific R. R. v. Road Dist.*, 266 U. S. 187; *Silberschein v. United States*, 266 U. S. 221.

⁴ *Bass, Ratcliff and Gretton Ltd. v. State Tax Commission*, 266 U. S. 271.

⁵ *Kansas City Southern R. R. et al. v. Road Improvement Dist.*, 266 U. S. 379.

⁶ *Michigan Public Utilities Commission v. Duke*, 266 U. S. 570.

⁷ *Fort Smith Light and Traction Co. v. Bourland*, 267 U. S. 1330.

⁸ *Work v. Rives*, 267 U. S. 175.

An order of a utility commission is held "*arbitrary*" and "*capricious*."¹

The Fourth Amendment condemns *unreasonable* searches and seizures. A search of an automobile for probable cause is held *reasonable*.²

The method of classification adopted in the Federal Income Tax is held not "*merely arbitrary and capricious*."³

There is not an *unreasonable* interference with the liberty of contract.⁴

Classification for state taxation is held *reasonable* and valid when it does not result in *flagrant and palpable inequalities*.⁵

A power exercised by Congress must be *reasonably* adapted to the effective exercise of delegated powers.⁶

A provision was not so "*unreasonable* as to be a *purely arbitrary* mandate."⁷

An inference allowed by law is held not "*fanciful, arbitrary* or *unreasonable*."⁸

A rule of a utility commission is declared *arbitrary* and *unjust*. Utility rates if *unreasonable* need not be confiscatory to be invalid.⁹

The court will give relief for *arbitrary, unreasonable, and unlawful* interference with business and property and *unreasonable* interference with the liberty of parents and guardians in bringing up children.¹⁰

There was no evidence of *arbitrary* or *unfair* action.¹¹

State acts are unconstitutional only when they are *arbitrary* or *unreasonable* attempts to exercise authority vested

¹ Ohio Utility Co. v. Public Utilities Commission, 267 U. S. 359.

² Carroll v. United States, 267 U. S. 132.

³ Barclay and Co. v. Edwards, 267 U. S. 442.

⁴ Yeiser v. Bysart, 267 U. S. 540.

⁵ Stebbins and Hurley v. Riley, 268 U. S. 137.

⁶ Linder v. United States, 268 U. S. 5.

⁷ Yee Hem v. United States, 268 U. S. 178.

⁸ North Laramie Land Co. v. Hoffman, 268 U. S. 276.

⁹ Banton v. Belt Line Ry., 268 U. S. 413.

¹⁰ Pierce v. Society of the Sisters, 268 U. S. 510.

¹¹ Maple Flooring Manufacturers Association v. United States, 268 U. S. 563.

in the state. A statute is not an *arbitrary* or *unreasonable* exercise of police power.¹

Claims of unreasonable and arbitrary action, hostile discrimination, or purely arbitrary exercise of power were made in numerous other cases passed on by the court.

October Term, 1924

Total cases under the Fifth and Fourteenth Amendments		45 cases
A. Denial of due process of law under the Fourteenth Amendment distributed as follows:		27 cases
State act or part of act held valid	8	
State act or part of act held invalid	3	
State administrative proceeding or order held valid	11 (relief denied 1)	
State administrative proceeding or order held invalid	3	
Judicial proceedings held valid	1	
Denial of equal protection of laws	1	
B. Denial of due process of law under the Fifth Amendment distributed as follows:		16 cases
Act of Congress held valid	4	
Act of Congress held invalid	0	
Administrative proceedings held valid	7	
Administrative proceedings held invalid	3	
Judicial proceedings held valid	2	
Decisions based on other provisions of Constitution (due process of law incidental)		2 cases
C. Grounds for appeal under due process provisions		
	Proceedings	Proceedings
1. Attempt to protect personal rights	Valid	Invalid
Fourteenth Amendment	7	3
Fifth Amendment	7	2
Individuals are granted relief in		5 cases
2. Corporations attack tax proceedings	11	
Corporations attack public utility regulations	7	
Corporations secure relief in		10 cases

¹ *Gitlow v. People of New York*, 268 U. S. 652.

PART IV

THE REVIVAL OF *DROIT NATUREL*, *NATURRECHT*,
AND SUPERIOR LAW DOCTRINES IN THE
JURISTIC PHILOSOPHY OF EURO-
PEAN WRITERS

CHAPTER IX

THE BACKGROUND FOR RECENT THEORIES OF NATURAL LAW AND THE GERMAN DOCTRINE OF A *RECHTSSTAAT*

1. *Continuance of Natural Law Theories in Europe.* A brief résumé of the stages in the evolution of higher law concepts has shown that for centuries after the Reformation natural law theories, as expounded in the authoritative works of the time, were commonly accepted as the basis of law both public and private. When positivists' theories of law were gaining ground over mediaeval conceptions the American and French Revolutions gave an impetus to another version of the natural law theories and to the rechristened dogma of the natural and inalienable rights of man, which it was the prime duty of the state to protect. But the reaction which followed these revolutions tended to discredit the idea of natural rights both in Europe and in America. During the middle of the nineteenth century there was a decline in the emphasis placed on natural law thinking and on the importance attributed to higher law concepts. Throughout the nineteenth century ideas of higher law, however, had many supporters in Europe among jurists and statesmen.

Modern theories of law were greatly influenced by the contributions to philosophy of two German thinkers, Kant and Hegel. Kant sought to discover principles which were above all codes and legislative enactments and to furnish a criterion to estimate the validity of all legal rules.¹ Though

¹ *Metaphysik der Sitten: Metaphysische Anfangsgründe der Rechtslehre* (2d ed., 1798). Kant's legal doctrines may be found in *The Philosophy of Law, An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, trans. by

Kant, like Rousseau, predicated certain limits to the powers of the state he also ended by conceding practically limitless power in the ruling forces of the state. His categorical imperative — "Act on a maxim which thou canst will to be law universal" — involved a combination of the idea of personal duty and of universal law. The state he conceived as a formula whereby the authority of the general will is made consistent with the perfect freedom of the individual will. It is only by means of a social contract after the pattern of Rousseau that such legal legerdemain can be consummated. But Kant's individualism prevented him from going to the limit of Rousseau in subordinating the individual will to that of organized society.

To Hegel the individual finds his existence in the state. The individual is free only by merging his will with that of the state. He rejected entirely the American and French doctrines of natural and inalienable rights. Liberty can be realized only through the state.¹ Like Rousseau and Kant, Hegel claimed that the individual has rights in the true sense only when they come from the state. While the philosophy of Rousseau, of Kant, and of Hegel tended in the direction of absolute authority in the state there were noteworthy lines of legal thought leading in the opposite direction.

Among the political thinkers of the early nineteenth century who sought to secure guaranteed juridical limitations upon the sovereignty of the state was Benjamin Constant, who claimed that sovereignty exists only in a limited and relative manner. At the point where the independence

W. Hastie (Edinburgh, 1887). Cf. also Duguit, "The Law and the State," *Harvard Law Review*, XXXI (November, 1917), 40 ff., and Michel, *L'Idée de l'état*, pp. 49 ff.

¹ Hegel's *Grundlinien der Philosophie des Rechts, oder Naturrecht und Staatswissenschaft im Grundrisse* (1821); Hegel's *Philosophy of Right*, trans. by S. W. Dyde (London, 1896). Hegel's theories of the state, sovereignty, and law were well designed to support a monarchy of the Prussian type. Duguit, *op. cit.*, pp. 57 ff.

of the individual begins, he asserted, the jurisdiction of sovereignty ends.¹ He defended the natural and indefeasible rights of the individual which form the basis of the juridical limitations on sovereignty. "I maintain," he said, "that individuals have rights and that these rights are independent of social authority, which cannot curtail them without becoming guilty of usurpation."² He believed that the individual had a right to refuse to obey a law contrary to the incontestable rights and pointed the way to a supreme court whose duty it should be to preserve these rights and to prevent the public powers from encroaching on them.³

After the completion of the Code Napoleon a school of legal philosophers again recurred to the earlier natural law notions. The rules elaborated in the codes were thought to be derived from man's nature and were regarded as independent of observation and experience. These natural laws were considered universal and invariable and positive laws to be valid should emanate from them.⁴

Among the leading natural law exponents in the nineteenth century were Karl Christian F. Krause who conceived of law as a postulate of reason and based his philosophy of law and justice essentially upon the doctrine of natural law,⁵ and Heinrich Ahrens, who accepted the philosophy of law of Krause and gave it wide circulation through-

¹ *Cours de politique constitutionnelle*, 4 vols. (Paris, 1819), I, 177, 306; Michel, *op. cit.*, pp. 299 ff.

² Cf. Duguit, *op. cit.*, pp. 105 ff.

³ Duguit speaks of Constant's doctrine on this point as "the French classical doctrine." For the advocacy of a similar doctrine by a German writer, consult Gerber, *Grundzüge des deutschen Staatsrechts* (3d ed., 1880). Duguit, *op. cit.*, pp. 119 ff.

For a defence of the rule of reason as a superior legal principle, consult Victor Cousin, *Cours d'histoire de la philosophie morale au 18e siècle* (1839).

⁴ *Progress of Continental Law in the Nineteenth Century*, Continental Legal History Series, p. 26.

⁵ See his *Grundlage des Naturrechts, oder philosophischer Grundriss des Ideals des Rechts* (Jena, 1803), and *Abriss des Systems der Philosophie des Rechts oder des Naturrechts* (Göttingen, 1828).

out Europe. His leading work,¹ originally published in French and German, passed through many editions and became the authoritative textbook of a modernized version of the ancient doctrine. [To Ahrens the philosophy of law and natural law are interchangeable terms and comprise the science which analyzes the first principles of law as conceived by reason. This science is based on the belief common to humanity, that principles of justice exist independent of law and of positive institutions, suitable for adaptation to all of the changes to which human nature is susceptible.] Ahrens distinguished between the will of the legislature (*mens legis*) and the reason of the law (*ratio legis*) which renders law in accord with the eternal principles of the true and the good. These higher or natural principles of law, he thought, are deduced from the nature and destiny of man.² The principles of the French Revolution developed in these works gradually introduced natural law ideas into the standard treatises and commentaries on French law.³ Dalloz gives an extensive account of the natural rights which are regarded as belonging to man as an individual.⁴ To Laurent "a right [*droit*] is anterior to a law; it is based on the nature of men and of civil societies. . . there is an eternal law [*droit*], an expression of absolute justice. This law or right [*droit*] reveals itself to the human conscience, in a measure

¹ *Cours de droit naturel ou de philosophie du droit* (Brussels, 1836-39). M. Röder was also a disciple of Krause; see his *Grundzüge des Naturrechts und der Rechtsphilosophie* (2d ed., 1860).

Josef Kohler thinks that books like those of Ahrens, Krause, and Röder "are not even worth enumerating; they are products of utter banality and poverty of ideas." *Philosophy of Law*, p. 25. This harsh judgment, like similar judgments of Kohler, does not do justice to the influence of these men on legal thought.

² Ahrens, *op. cit.*, I, (6th ed., Leipzig, 1868), 1 ff., 96 ff.; II, 1 ff., 146.

³ For a consideration of natural rights sanctioned by the Code Napoleon, consult Duguit, *Les transformations du droit privé* (Paris, 1912).

⁴ See *Répertoire de législation de doctrine et de jurisprudence*, XIX (new ed., 1852), 11 ff., and *Supplément*, VI (Paris, 1890), 425 ff.

as man approaches divine perfection. This law is progressive as are all manifestations of the human spirit. It tends continuously to realize absolute truth. It is necessary for the legislature to follow the progress which is made through the general conscience of man."¹

Catholic or Traditionalist leaders repudiated the natural rights theories of the Revolution but predicated a higher law of another type. Saint Martin, De Maistre, De Bonald, Ballanche, and Lamennais set in opposition to the Declaration of the Rights of Man a Declaration of the Rights of God.² For these leaders of the Theocratic School political authority emanates from God and not from a mythical state of nature or from inherent qualities of the individual. To the rights of man De Bonald opposed as superior and paramount the rights of God and to the sovereignty of reason he opposed the sovereignty of faith.² The reconciliation of man to the ways of God was made under the directing influence of nature or natural rights as belonging to the individual, which appealed to the Traditionalists for they directed their attacks against eighteenth-century individualism and the doctrines of the Declaration of Rights. That there is no sovereignty is also the underlying principle of Royer-Collard's

¹ F. Laurent, *Principes de droit civil* (5th ed., 1893), I, pp. 50, 51. Pothier used natural law to supplement and modify Roman law rules as to contracts in laying the basis for a principle of modern Continental European law, that deliberate promises, being morally binding, were legally binding. *Traité des obligations*, Pt. I, chap. 1. Cited in Pound, *Law and Morals*, pp. 91, 92.

² See De Bonald, *Discours préliminaire à la législation primitive*; also *Théories du pouvoir politique et religieux dans la société civile* (1796), and *Essai analytique sur des lois naturelles de l'ordre social* (1817). Harold J. Laski, *Authority in the Modern State* (New Haven, 1919), chap. 2 and chap. 3 on Lamennais. Joseph De Maistre, *Considérations sur la France* (1796); *Essai sur le principe générateur des constitutions politiques et des autres institutions humaines* (1810). For summary of the theocratic theories in the reaction against the political philosophy of the French Revolution, consult Michel, *op. cit.*, pp. 99 ff., and Harold J. Laski, "De Maistre and Bismarck," in *Studies in the Problem of Sovereignty* (New Haven, 1917).

³ Laski, *Authority in the Modern State*, p. 130.

political theory.¹ In order to limit the powers of the state and in order to preserve individual liberty he regarded it necessary to discard the concept of sovereignty. Guizot, who supported the doctrine of limitations upon the state based on a higher law, was a follower of Royer-Collard.² In fact, Victor Cousin, Royer-Collard, and Guizot appealed to reason as a basis to support aristocracy and the rule of the wisest.³ Since the Traditionalists made religion the basis of political stability and the following of the laws of God the first requisite for the rulers and the people in a well-ordered society, their doctrines were quite acceptable to a large group in French society which has always been influential in political circles. The modern revival of the Traditionalist type of thinking, which will be considered in a later section, justifies the comment of Laski that "the authoritarian tradition is far from dead."⁴

Except for the Catholic Schools there were few in France during the middle of the nineteenth century who publicly supported the theories of natural rights, which held such a prominent place during the French Revolution. In the latter part of the century A. Boistel, Beudant, and Henri Michel tried to revive interest again in the former ideas of individual natural rights.

Boistel used the philosophy of law, the law of reason, and the law of nature as approximately interchangeable terms.⁵ Natural law or the *droit rationnel* was defined as "the group of rules which in the light of reason ought to be sanctioned by an exterior constraint." He regarded the principle at the basis of law which justifies its maintenance as "the in-

¹ Laski, *Authority in the Modern State*, chap. 4; Michel, *op. cit.*, pp. 200-209.

² Michel, *op. cit.*, pp. 203 ff.

³ Cf. Alfred Fouillee, *Idée moderne du droit*, trans. in *Modern French Legal Philosophy*, Modern Legal Philosophy Series, VII (Boston, 1916), 152.

⁴ Laski, *Authority in the Modern State*, p. 167.

⁵ A. Boistel, *Cours de philosophie du droit* I (Paris, 1899), 1. The original work based on the principles formulated by Rosmini was issued in 1870.

violability of human personality.”¹ From this individualistic principle he sought to develop an entire legal system.² This point of view led to an overemphasis on the individual moral personality and to a depreciation of the social and collective influences in the development of the law.³

Beudant, returning to the Declaration of Rights of 1789 and to the former schools of natural law, “based law upon reason, opposed individual rights to the state, and even exaggerated that opposition by seeing in every case of state intervention a restriction of individual rights.”⁴ Human rights, he thought, exist before the law and they are above the laws.⁵

After a survey of the political and economic thought of France during the nineteenth century in which one of the dominant ideas was the reaction against the individualistic philosophy of the French Revolution, Michel defends the essential doctrines of the individualistic school. He believes there is “an individualism based on the living sentiment and the dignity of the human person” which is at the very foundation of the social and political order.⁶ State action, he thinks, must continuously be subordinated to the rights of the individual. “Individualism, as we conceive it, is alone capable of furnishing a rational foundation for the philosophy of law as well as for political liberty and for the sovereignty

¹ *Ibid.*, pp. 72 ff.

² Geny criticizes Boistel's work as based on artificial reasoning to which the author attaches objective validity. It has the result, he thinks, “to give an assured place only to a small number of general ideas, derived from a very exalted sphere, but scarcely capable from these alone to lead to anything else than an inspiration of justice.” François Geny, *Science et technique en droit privé positif* (Paris, 1915), II, 292-294.

³ Cf. M. Hauriou, “Philosophie du droit et science sociale,” *Revue du droit public*, XII (1899), 462.

⁴ Charmont, *La Renaissance du droit naturel* (Paris and Montpellier, 1910).

⁵ Cf. his work on *Le droit individuel et l'état*.

⁶ Michel, *op. cit.*, p. 628. “The idea of the sublime dignity of the human person is what the eighteenth century has bequeathed to us.” *Ibid.*, pp. 60, 644.

of the people.”¹ Michel contended that not only was the state obligated not to interfere with the natural rights of man but it was also its duty to render positive services in the way of furnishing work, assistance, and instruction.

Boistel, Beudant, Michel, and other legal philosophers aimed to turn legal thinking again either to the natural law theories of St. Thomas, transformed to meet the conditions of nineteenth-century Europe, or to the inherent rights of man which, according to the Declarations, were above and beyond the sphere of state authority. But these efforts to restore higher law ideas to a measure of their former prestige and influence were not generally approved owing to the dominance of the Positivist concepts both in legal theory and in political practice. The attempts to turn legal thinking in the channels of natural rights as conceived by the leaders of the French Revolution and to emphasize again the rights of the individual proved futile at a time when political and economic thought was beginning to be dominated by a social point of view. It remained for a modern school of jurists to adapt the natural law concepts to radically different economic and social conditions.

By the end of the nineteenth century and the beginning of the modern era the efforts to revive natural law thinking interested so many jurists and legal philosophers in Europe that a revival of this mode of thinking has become a phase of a national and an international movement. The nature of this movement can best be comprehended through the presentation of some of the salient views of representative thinkers belonging to the new school. Though the representatives selected differ widely in their approaches to the problem and formulate divergent phases of the necessity of a return to higher law theories, they have elements in com-

¹ Michel, *op. cit.*, p. 630.

mon which make it appropriate to consider their contributions to this phase of legal thought.

2. *German Doctrine of a Rechtsstaat.* The inspiration for some of the most suggestive higher law theories of modern times may be found in the thorough and stimulating investigations of Otto Gierke. Not only have his works furnished a clue for an attack on the absolute theories of sovereignty in Europe but also they have given an impetus to a new school of political theorists, the Pluralists, who deny the unity, inclusive, and thoroughgoing supremacy of political sovereigns.

Gierke, as previously noted, analyzed distinctly the mediaeval doctrine as to the relations of law and the state. The state, according to the mediaevalists, was not based on law but on moral necessity; its aim was the promotion of human welfare and the realization of law was one of the appropriate means to this end.¹ The state and the law were of equal rank and one did not depend upon the other. A distinction was made between the natural laws, which were above the state, and the positive laws, which could in no way bind the sovereign.² And there was everywhere a tendency to set limits to the growing powers of sovereignty. These limits might be ascribed to the overruling natural law, to vague theoretical limits arising from the necessity of the consent of the community, or to the insistent claims for a recognition of rights by smaller groups within the confines of the state. With this background Gierke was led to regard it as "impossible to make the state logically prior to law [*Recht*] or to make law logically prior to the state, since each exists in, for and by the other."³ Though today the state is a lawmaking authority, it does not become, Gierke

¹ Gierke, *Political Theories of the Middle Ages*, p. 74.

² *Ibid.*, p. 78.

³ Gierke, *op. cit.*, Maitland's Introduction, p. xliii.

asserted, either the final source of law or a unique organ for its making. The real source of law is to be found in the common feelings or sentiments of the people. And while it is the chief function of the state to express in law the juridical conscience of the people other organs than the state participate in the lawmaking process.¹ A philosophic basis was established for a *Rechtsstaat*, or a state founded on justice, which has received the support of some of the foremost jurists of Germany.²

Though modern natural law theories are advocated for extremely divergent purposes and in strikingly varied forms, the influence of Gierke's views may readily be discovered in many of the recent attempts to revive the higher law philosophy.

3. *Current Views Relating to Natural Law in Germany.* Despite the espousal of natural law theories by prominent German jurists and philosophers during the eighteenth and the nineteenth centuries, the influence of Kant, Hegel, and Von Ihering combined with the growing sentiment of nationalism turned legal thought in a direction which fostered

¹ There is between law and the State [says Gierke] a reciprocal penetration of a particularly close and intimate nature. The law is innate in the State. Law is no more begotten by the State than the State is begotten by law. But, although each has its own reasons for being, each is developed by the other. . . . Today the State acts as an organ in the formation of law. But for that reason the State does not become either the ultimate source of law or the sole organ in its formation. The ultimate source of law resides rather in the common consciousness of the social being. The common belief that something is right needs, for its external realization, materialization by a social expression, as for instance, in a rule of law . . . not infrequently this expression takes place through and by means of the State, which has for its principal rôle the shaping of the juridical consciousness of the people in the form of law. But social organisms other than the State can formulate law. . . . Juridical life and the life of the State are two independent sides of social life. While power is a rational condition of the State because a State without omnipotence is not a State, it is immaterial, so far as the notion of law is concerned, that there exists for it means of external power; for law without power and without action always remains law. Gierke, "Die Grundbegriffe des Staatsrechts und die neuester Staatstheorien," *Zeitschrift für die gesammte Staatswissenschaft*, p. 306; quoted by Duguit, *op. cit.*, pp. 159, 160. Cf. comments by Gierke in *Zeitschrift für die gesammte Staatswissenschaft* (Tübingen, 1874), p. 179.

² See also Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorien* (3d ed., Breslau, 1913), chap. 6.

state omnipotence and led to the repudiation of every type of higher law philosophy. Hence, most contemporary German legal philosophers have rejected the system of natural law and have asserted that law is derived exclusively from the state. "It is without doubt a great advance of modern philosophy of law, as distinguished from the earlier law of nature," observed Ihering, "that it has recognized and forcibly emphasized the dependence of law upon the state."¹ To Ihering the state is society exercising coercion and law is the policy of force; or in the principles of Treitschke: "Der Staat ist Macht."²

Joseph Kohler from a different standpoint joined the critics of natural law concepts. Natural law, which had protected the nations against the caprice of princes and the papal power and had upheld the demands of what was reasonable in the face of what had become historical, since Hugo Grotius, he thought, has done scarcely more than to serve as the basis for an emerging international law. "At the beginning, natural law may have had significance as a protection against arbitrary rule, but this it soon lost, at least in Germany and France, and became instead the hobby of well-meaning absolutism which undertook to maintain natural law by setting its foot on the neck of the nation and trying to force it to be good, just, and happy."³ On the other hand, the patriots of the French Revolution made use of it in unfurling the banner of rebellion. There is, he maintains, no eternal law—the law that is suitable for one period is not so for another.

¹ *Der Zweck im Recht* (1877), trans. in part in *Law as a Means to an End*. Modern Legal Philosophy Series, V (Boston, 1913), 178. For a criticism of the eighteenth-century natural rights theories, see L. von Savigny, "Das Naturrechtsproblem und die Methode seiner Lösung," *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich*, G. Schmoller, XXX, 407-417.

² Treitschke, *Politik* (Berlin und Leipzig, 1899-1900). Cf. Duguit, *op. cit.*, pp. 126 ff.

³ Kohler, *Lehrbuch der Rechtsphilosophie*, trans. as *Philosophy of Law* in Modern Legal Philosophy Series, XII (Boston, 1914), 5, 6, 10.

Ehrlich also criticizes the *Naturrecht* philosophy as invariably resulting in an individualistic jurisprudence. There is, he insists, no individual right — every right is a social right.¹

The prevailing German doctrine, which is based on the repudiation of natural law and of inalienable rights, results in the denial that constitutions are laws and that such written enactments² have any superior validity. At best it accords limits to the powers of the state based on self-denying ordinances or auto-limitations which rest for their enforcement with the consciences of those who control the destinies of the state.³ Hence, the *Naturrecht* philosophy, though frequently defended by German jurists, was vigorously attacked by the Positivists and by the Sociological School of jurisprudence. It is significant, however, that in the wake of a thorough repudiation of the natural rights theories German legal thinkers are again leading the movement for a revival of natural law.⁴

At the same time that legal philosophers and jurists of continental Europe regard the eighteenth- and early nineteenth-century notions of fixed and immutable natural or higher laws as repudiated, there has arisen a juristic movement which may be termed "a revival of juridical idealism" which is bringing to the forefront again the doctrine of natural law. One of the best-known exponents of this juridical idealism, Rudolf Stammler, gave the clue to the new move-

¹ Eugene Ehrlich, *Grundlegung der Soziologie des Rechts* (Leipzig, 1913), p. 34; "Es gibt kein Individualrecht, jedes Recht ist ein Sozialrecht. Das Leben kennt den Menschen als einem aus dem zusammenhange gerissenen einzelnen und einzigen nicht, und auch dem Recht ist ein solches Wesen fremd."

² This is the doctrine which Hauriou styles the "brigandage juridique" in "Le droit naturel et l'Allemagne," *Le Correspondant*, CCLXXII (September 25, 1918), 913.

³ Ihering, *Der Zweck im Recht* (1880), pp. 318, 344, and *Law as a Means to an End*, pp. 267, 314; Jellinek, *Allgemeine Staatslehre* (1900), pp. 303, 330 ff.

⁴ Erich Jung, *Das Problem des natürlichen Rechts* (Leipzig, 1912); Alfred Manigk, *Wo stehen wir heute zum Naturrecht?* (Berlin-Grunewald, 1926).

ment when he insisted that he was not an advocate of a fixed and immutable natural law but of "a natural law with a variable content."¹ Stammler believes that law comes before the state and that the state is a creature of law.²

In setting for himself the problem of finding the "just law" or "richtige Recht" Stammler repudiates the *a priori* principles of the old natural law and instead aims to determine a formal criterion by which law may be evaluated. The concept of just law is based on a fundamental characteristic of the social order, namely, a feeling for right or a longing for justice.³ Stammler, as a follower of Kant, sought to formulate by pure reason "a formal method of general validity." Though he recognized that purely formal law may for the time being prevail over "fundamentally just law" in due course such formal law must be tested by and subordinated to the higher conception of "richtige Recht."⁴ Hence, he turned to what he regards as a "fundamentally and eternally true idea of natural law, which implies a content in agreement with the nature of law rather than with the nature of man."⁵

It is interesting to note that Stammler's theory of just law has nothing to do with the validity of any particular law. "Just law" is to be used for the interpretation of legal rules only when the legislature grants such authority. To allow judges or other officers to refuse to enforce laws because they consider them as unjust, Stammler thinks, would sub-

¹ Cf. Stammler, *Wirtschaft und Recht* (2d ed.), pp. 165, 176, 181, 456; *Theorie der Rechtswissenschaft* (Halle, 1911), pp. 124 ff.; *Die Lehre von dem Richtigen Rechte*, 2 vols. (Berlin, 1902-07), I, pp. 93 ff., 196 ff. The last of these volumes has been translated in the Modern Legal Philosophy Series under the title, *The Theory of Justice* (New York, 1926).

² "Fundamental Tendencies in Modern Jurisprudence," *Michigan Law Review*, XXI (April, 1923), 623, 765.

³ *The Theory of Justice*, pp. 22, 116.

⁴ See F. Geny, "Critical System of Stammler," in *The Theory of Justice*, pp. 508 ff.

⁵ *Ibid.*, p. 516.

stitute the arbitrary will of a few individuals for the regular and orderly authority of established legal rules.¹ Geny, who regards Stammler as the foremost legal philosopher of modern Germany, believes that the great defect of his speculations lies in the failure to relate "richtige Recht" to the positive law of a given country.² His efforts seemed to be exhausted in making distinctions and in laying down criteria. What appears to many to show the utter impracticability of his theorizing is to be found in the observation that "the principles of just law do not contain in their idea and form anything of the specific content of positive law."³

That there is a law in agreement with nature or reason and which should remain once and for all absolutely just, Stammler denies. But he advocates a law of nature which may serve as a formal criterion or standard to test the justice of a given law and insists that the standard or criterion is not a law; by it primarily legal concepts are judged and characterized as just or unjust. "Just law, like the law of nature, is a law or laws with specific legal content which is in accord with the standard. It is then objectively just, but not absolutely just; for the moment the circumstances change, the same legal content will no longer be in accord with the standard and hence will cease to be just."⁴

Efforts to direct attention again to the *Naturrecht* philosophy in Germany have received their chief support either from those who belong to schools imbued with religious or

¹ *The Theory of Justice*, pp. 81, 511 ff.

² *Ibid.*, p. 548.

³ *Ibid.*, p. 211; and Alfred Manigk, *Die Idee des Naturrechts* (Berlin und Leipzig, 1926).

⁴ Isaac Husik, "The Legal Philosophy of Rudolf Stammler," *Columbia Law Review*, XXIV (April, 1924), 373, 387, 388, and Stammler, *Mich. Law Rev.*, XXI, 638. Says Stammler, "absolute validity is possessed by the system of *pure forms*, by which alone the intellectual life in general can be methodically ordered." Illustrations of the pure form of legal speculation are "the notion of law" and "the idea of law." For an analysis of the theories of Kohler and Stammler, consult William Ernest Hocking, *Present Status of the Philosophy of Law and of Rights* (New Haven, 1926), p. 30.

metaphysical speculations or from those who are seeking a basis for a new international law outside of conventional legal rules. Each of these tendencies will be considered in subsequent sections.

The modern revival of natural law philosophy is frequently advocated in France and it will be of interest to give a condensed account of the views of a few representative French authorities.

CHAPTER X

FRENCH THEORIES RELATING TO SUPERIOR LAW HIGHER LAW DOCTRINES OF KRABBE

1. *Views of Saleilles and Charmont.* One of the French jurists who aided materially in the development of the legal and philosophical bases for a revival of natural law was R. Saleilles.¹ Saleilles refers to one of the objects of the Historical School of jurists which was designed "to set aside forever what was called the chimera of natural law founded on reason" or of anything permanent and immutable in the nature of man which might become an object of law. Not only was it their purpose to reject the classical conception of natural law but also to discredit all references to general principles or to juridical constructions which were thought to smack of natural law or of metaphysical connotations. The tendency on all sides was to turn in the direction of a "practical empiricism" which Saleilles regarded as deceptive and disturbing to the conscience. Following some of the tendencies of the thought of Savigny jurists were inclined to limit the function of the judge and to deny that in his decisions he had any concern with concepts of the rational, equitable, or just. Similarly they aimed to limit the legislator to a considerable degree to the interpretation of pre-existing customs only—customs which might be discovered, noted, and translated into legal formulae. Hence in the minds of such jurists natural law had been discarded to its last consequences, to the

¹ "École historique et droit naturel d'après quelques ouvrages récents," *Revue trimestrielle de droit civil* (1902), pp. 80-112. For Saleilles' views regarding the rights of the individual and of social groups, consult *De la personnalité juridique* (Paris, 1910), and Georges Davy, *Le droit, l'idéalisme et l'expérience* (Paris, 1922), pp. 5 ff.

three degrees of juridical function: legislative, scientific, and judicial.

In the face of the dogmas of the Historical School and of the dominance of the tendencies toward practical empiricism Saleilles sought to discover evidences of the application of the old ideas of natural law appearing under new or concealed forms. Noting the hurried and confused processes in the ordinary making and applying of law in which the use of natural law ideas is likely to be slight, he says: "Recent theorists no longer think of an ideal or natural type of law applicable to all civilized peoples." But the general lines of a new natural law are to be discovered in the realm where the scholar, the legislator, and the judge evaluate first what the law is and then indicate the rules which ought to apply, following the principles of abstract reason. It is in this process that the judge, through his independence and his large powers of interpretation, participates actively in lawmaking.

How can it be believed in fact if not in law [observes Saleilles] when the text is doubtful, that the judge will not allow himself to be guided, even if unconsciously, by his rationalising tendencies, even when legislation has not made it a prescribed duty as is the case for example in Art. 7 of the Austrian Civil Code? When all the arguments, as was said formerly, are exhausted, as well as deductive reasons, analogy, juridical construction, the Austrian Code makes it obligatory for the judge to decide according to natural law; the latter thus acquires a subsidiary value. The modern judge will not wait, undoubtedly, until all the arsenal of logical processes has been exhausted to obey what was wont to be called the light of reason. It is really then that the question of natural law assumes a practical importance of the first order.¹

In the judgment of M. Geny, the jurist is expected "to have the right to orient himself and to direct his interpretation toward a future postulate which is dictated to him by his

¹ "École historique et droit naturel," par M. le Professeur Saleilles, *Revue trimestrielle de droit civil* (1902), No. I, éditée par la Société du Recueil Sirey, Paris, pp. 84, 85. I am indebted to the Société du Recueil Sirey for permission to use translations of parts of this article.

conscience and by his reason." Saleilles, following Geny's point of view (in speaking of a revival of natural law), has in mind principles "deduced from abstract reason and from philosophical intuition." It is not a question, he says,

of the principles which are at the source of a legal rule itself but of simple processes of juridical technique, necessary to establish harmony in a legislative system, in order to coördinate the scattered parts and to allow the interested parties to guide themselves, in the applications which they make of the law, by reasonings which can give them a degree of certainty. It is a question of putting the provisions of the law or of a group of laws in harmony with the whole, and then to deduce, with this aim in view, certain directory rules implied by concrete solutions of the text. In this way the scattered findings are gathered under a certain number of abstract principles, which will be used as a point of departure for new developments and which the law can adopt in relation to questions not previously provided for.¹

Bierling's analysis is then followed, which distinguishes between principles of juridical technique which have no bases in absolute truth and principles of a philosophical character which have objective validity and may be used as a rational means to test legal rules. And attention is directed to the emphasis on a revived natural law in the works of Geny, Duguit, L. von Savigny, and Stammler. The failure of the Historical School to recognize the creative force of reason and the guiding influence of principles is regarded as in part responsible for a reaction from the tenets of the school which has taken jurists in the direction of Stammler's "natural law with a variable content." Stammler recognizes the existence and the legitimacy of this natural law of a variable content, which does not pretend to be absolute and immutable, but which nevertheless has its place in the successive stages of historical evolution.²

¹ Saleilles, *op. cit.*, p. 87.

² Saleilles notes that Geny wishes the judge to go directly, without indirectness, fictions, or equivocations to the only realities which exist outside of the text, to the inspirations of the idea of justice, which at once takes him into the realm of natural law.

Recognizing that there is a revived natural law and that it is the duty of the judge to make use of such a law in guiding his interpretations¹ Saleilles sees a danger in that a judge is likely to be influenced by his individual conceptions and his decisions may become subjective and arbitrary. Hence if natural law is to find its place as a factor for rendering justice some objective grounds for its applications must be found. The objective criteria are to be found, he thinks, in the development of doctrines and principles which, when tested by the facts and conditions of the time, are well enough recognized to be accepted as a consensus of current opinion.

Great caution is to be taken in selecting these objective bases for Saleilles thinks the judge in applying principles of jurisprudence should exercise unusual care in introducing new ideas into his decisions "unless it is a question of the application of one of the natural laws — which are supposed to be conceived instinctively by whoever expresses accurately the collective conscience of a time."² And he observes:

That which must be placed in the foreground, and the point on which I am in complete agreement with M. Geny, is that the judge must accept as the basis of his methods of interpretation the idea and the conviction that there is an individual justice existing objectively, which ought to be in accord with the social justice of which the law is for him the imperative expression; that, as a result, if he has the duty to guide the changing interpretation of a law, outside of his formal texts, he must take for a guide this absolute conviction of the idea of justice in its adaptation to the exigencies of the social order.

But what concrete conceptions shall he form of this idea of justice and how between two possible solutions shall he objectively decide which one will correspond to this idea, applicable to the historic conditions of the time, I mean to the conception of justice which one should adopt in the historical milieu of a given time and under the social conditions which it presents. Will he find in his conscience solely

¹ There is, says Saleilles, "a juridical and social order in which the solution, entirely opposed to the one given formerly as the immanent expression of justice, is going to appear as incarnating in its turn the natural law of the times." *Op. cit.*, p. 98.

² Saleilles, *op. cit.*, pp. 101 ff.

from the innate idea of natural law of which all the partisans of ideal law speak, a definite and precise answer such as all the judges, supposedly equally impartial, equally devoid of any personal bias, would themselves give? It is only necessary to present the question in order to see that considering the conditions in the progress of humanity and the complexity of diverse clashing interests, the relationships of which are often necessarily reversed by the law of history, this objectivity is impossible even in an ideal sense. The answer would be given by the subjectivism of each whether political, economic, philosophical or religious. We find ourselves face to face with the worst dangers of what we have sometimes called, not without a certain irony, judicial equity.

The judge has the right to make a concrete application of the ideas of absolute justice that an ideal of abstract natural right can suggest to him, only if these conceptions have already found an objectivity exterior to him and susceptible to a juridical command; only if, by some experimental method, analogous with the process of legal verification which is his first duty, the judge finds, outside of himself, some elements of a juridical command imperative, which he only needs to note and apply, in order to remain within his function, which is, in other words, to ascertain the law and to declare that it be respected.¹ . . . But again in cases where the judge should find, at any rate in actuality, no support in the law, where he would be the first to recognize this new principle of ideal justice which has not yet become accepted as substantive law and to make a concrete application of it, thereby paving the way for the legislator, in such cases it is from the juridical conscience of the collective body that he will have to borrow its elements; and in this regard I could only repeat what I have elsewhere said — consequently I content myself with merely a reference — about the juridical value accorded to sound customs and the conception of them the judge must form wherever the law forces him to take them into account in order to pass upon the validity of private acts. It would appear that in such cases it is the law itself which yields before natural law, prompting the judge, as it does, to have recourse to the latter. It would indeed seem so, if one has in mind a natural law in process of evolution having objective bases in the popular conscience; the contrary would appear true if one saw in it an invariable moral formula; or, at the least, assuming it could vary, if it was used as an ideal, it would be the personal and purely subjective system of him whose duty it is to make its application, that is to say, of the judge himself.²

¹ Saleilles, *op. cit.*, pp. 105, 106.

² *Ibid.*, p. 108.

These objective criteria, Saleilles believes, can be formed only by means of legislative analogy, the collective juridical conscience, and comparative law, by which the interpretations of judges may be guided. In this process the work of legal scholars in what the French call the development of "juridical doctrines" has a large place and the judge's function would be a restricted one, for

when general opinion, under the form it takes and under which it adapts itself gradually to the economic and social changes of a period, becomes unanimous as to certain concepts of justice, and when this conception is such, I have said elsewhere, that those to whom it is presented are ready to recognize its worth, the judge has the right to make of himself the organ, not blind and purely passive, of this inorganic sentiment of the collective conscience, but the interpreter who becomes saturated with its inspiration in order to adapt it to the legal juridical order of which he is the guardian and the defender. He has not the authority to substitute at one stroke one ideal system for another; but his mission is to draw inspiration from it, when he is sure of his ground, in order to infuse it into his interpretation of the general characteristics of the law, and to make of the conflict of the systems, when these become opposed in the abstract, a workable system of justice, which in the domain of the concrete guarantees acquired rights, giving satisfaction at the same time to new rights which claim recognition.¹

The safest and scientifically the most satisfactory method of discovering these objective bases for a revived natural law, Saleilles claims, is through comparative law whereby the ideals of the jurists are put to the test by legislators and judges. In the practical juridical applications may be found their permanent and enduring qualities, at least, for the particular time and place. It is in this connection that Saleilles gives a warning, if too large powers are accorded to the judges in applying principles of justice, that there is grave danger that personal and political views, not having objective validity in the juridical conscience, may be applied as if they

¹ Saleilles, *op. cit.*, pp. 108, 109.

were immanent truths. Thus comparative law because it brings together different juristic concepts of natural law and reduces them to concrete formulae of juridical application is hailed as a method of establishing a common law of humanity. Though natural law will always serve in an auxiliary and supplementary rôle in any national system of law it is, however, regarded as the chief source of guidance for scientific judicial evolution.

Charmont credits the school of natural law and of natural rights with the laying of the foundation of modern constitutional law, with the determination of the basic principles of private and public international law, and with certain contributions to the amelioration of criminal laws.¹

According to Charmont, "natural law, as the old school conceived it was universal, immutable; for all questions of positive law it offered the ideal solution, satisfying in every respect; and the human reason could and should find this solution."² Positive law, then, was conceived as contingent and imperfect; natural law as the ideal, the absolute. The new view considers natural law as variable and not incompatible with the law of evolution. It has, in the words of Stammler, a "variable content." In conclusion, says Charmont,

the idea of natural law, then, is differently conceived from the way it formerly was. It rests upon another foundation, and at the same time it undergoes certain transformations. It reconciles itself with the idea of evolution, with the idea of utility. It loses its absolute and immutable character; it possesses only a variable content. It takes account of the interdependence of the individual and of the community. It thus tends to bring into accord the individual conscience and external law instead of setting them into opposition. In this trans-

¹ J. Charmont, *La renaissance du droit naturel* (Montpellier, 1910), p. 167, and *Modern French Legal Philosophy*, pp. 106 ff. The natural law school, Charmont claims, was founded by Hugo Grotius, 1583-1645; Pufendorf, 1632-94; and Burlamaqui, 1694-1748. Cf. Charmont *op. cit.*, pp. 10 ff., for a brief summary of the theories of the different schools of natural law or natural rights.

² *Op. cit.*, pp. 6, 54.

formation juridical idealism is not weakened; on the other hand it has been consolidated and enlarged.¹

Though Charmont is an advocate of the modern theory of natural law, he conceives the theory as a sort of an ideal standard for juristic philosophers and legal thinkers and not as a formal rule of law to be followed literally by the courts and the judges. In reviewing Geny's theory of free legal decision, Charmont indicates the weakness in the former attempts to apply the theory of natural law. "The idea of a right conceived by reason," he says, leads "logically to the rule of formal law, to an exaggeration of the element of legality. Law is formulated and sovereign reason; it can and it should foresee and decide all things. The sole function of the judge is to assure its application."² And, he continues,

the traditional doctrine that the legislator settles everything in relation to a phase of legal relations and that the judge's sole business is to discover the legislative will has incontestable advantages. It strengthens the interpreter in making him the mouthpiece of the law; it satisfies the demands of our classical spirit and it seems to give great stability to our legal doctrines. But as against these advantages, it is necessary to note inconveniences.

We are bound at the moment the law is made. The law, which is regarded sufficient to itself, is isolated from the other sciences and loses all contact with life. The respect of the interpreter for texts is only a vain appearance, for he himself in reality creates the principles which, in order to gain for them a semblance of authority, he ascribes to the lawgiver. These so-called principles which are only subjective conceptions are developed so as to become tyrannical, embarrassing science and forming an obstacle to progress.³

Charmont thus recognizes some of the difficulties and gives the basis for the criticisms which have resulted in the application by American justices of the so-called rule of reason as a standard to test the validity of legislative acts. The deci-

¹ *Op. cit.*, pp. 217, 218.

² *Ibid.*, p. 174, and *Modern French Legal Philosophy*, p. 112.

³ *Op. cit.*, pp. 175, 176; *Modern French Legal Philosophy*, pp. 113, 114.

sion of a judge, thinks Charmont, "who acts as a law-maker will always appear individual, arbitrary, and partial; it will not have the authority of law."¹

A French authority, whose works are better known than those of Charmont, also seeks to discover a new juridical idealism in which the ideal of the epoch supplants the absolute ideal. Demogue conceives natural law as an ideal concept rather than as a rule of positive law,— as a law to be sought in the struggle to secure harmonious adjustments of social life. He aims to find an ideal law in the presence of certain facts, historical, economic, and political, which appear as a result of the investigations of social science and from the aspirations of humanity.²

2. *Views of Duguit and Hauriou.* Though Léon Duguit was one of the foremost critics of natural rights theories, he was one of the ablest advocates in France of the principle that there is a law superior to the state. Originally presented in his *L'Etat, le droit objectif et la loi positive*, which appeared in 1901, Duguit's doctrines were amplified and developed since this date. He repudiates the notion that rights may be based on the "high dignity of the human being"³ and rejects the implications of the theories of Ihering, Laband, and Jellinek that law is comprised solely of rules established by society with the coercion of the state behind them.

Duguit sets out to demonstrate that law can be anterior

¹ Saleilles, *op. cit.*, p. 189; *Modern French Legal Philosophy*, p. 123.

² *Les notions fondamentales du droit privé*, trans. in part in *Modern French Legal Philosophy* (Boston, 1916); see p. 345, and especially pp. 370 ff.

³ "The affirmation that man because he is man, taken isolated and by himself, separated from other men, in the state of nature, as they said in the eighteenth century, is endowed with certain rights, peculiar to his nature as man — this affirmation is purely gratuitous; it cannot be supported by any direct proof. It is a purely metaphysical proposition with respect to the nature, or, as the schoolmen used to say, the essence, of the human being. This affirmation might suffice in a period of metaphysical belief, but it is purely a verbal expression — nothing more — in a positivist and scientific epoch like ours. It can satisfy a believer, but it is void of all scientific and positive value." Duguit, "The Law and The State," *Harvard Law Review*, XXXI (November, 1917), 23.

and exterior to the state. Those who recognize a law beyond the realm of state action find the origin of this law in a deity, or in the individual, or in society. Rejecting a religious and metaphysical basis for a superior law, and discarding the philosophy of individual rights, Duguit turns to the social basis for a law exterior to the state. He finds the origin of those superior rules of law in certain norms which condition man's living in society and which form the basis of other norms sanctioned and enforced by the state.¹

"We believe firmly," says Duguit, "that there is a rule of law above the individual and the state, above the rulers and the ruled; a rule which is compulsory on one and on the other; and we hold that if there is such a thing as sovereignty of the state, it is juridically limited by this rule of law."² He denies, however, that there are subjective individual rights or natural rights which furnish a basis for these superior laws. The postulate of individual natural rights involves, he thinks, two contradictions — the sovereignty of the state and the autonomy of the individual. An individual right superior to the state is considered as a pure hypothesis and not a reality. It implies a social contract at the origin of society which is deemed a manifest contradiction.³ Rights, it is maintained,

¹ See *Traité de droit constitutionnel* (2d ed.), I, 11 ff. The chief works of Duguit, all of which have a common purpose, are: *L'État, le droit objectif et la loi positive* (Paris, 1901); *L'État, les gouvernants et les agents* (Paris, 1903); *Manuel de droit constitutionnel: Théorie générale de l'état-organisation politique* (Paris, 1907; 4th ed. 1923); *Le droit social, le droit individuel et les transformations de l'état* (Paris, 1908; 3d ed. 1924); *Traité de droit constitutionnel* (2 vols., Paris, 1911, 2d ed., 5 vols., 1921-25); *Les transformations générales de droit privé depuis le Code Napoléon* (Paris, 1912); *Les transformations de droit public* (Paris, 1913); *Souveraineté et liberté* (Paris, 1922).

For a summary of Duguit's doctrines, see Roger Bonnard, "La doctrine de Duguit sur le droit et l'état," *Revue internationale de la théorie du droit*, I (1926-27), 18 ff.

² Duguit, *L'État, le droit objectif et la loi positive*, p. 12, and *Modern French Legal Philosophy*, pp. 246-248; also "The Law and The State," *Harv. Law Rev.*, XXXI (November, 1917), 23.

³ Cf., for Duguit's views in opposition to subjective natural rights, *L'État, le droit objectif et la loi positive*; *Traité de droit constitutionnel*, I, 9-13; *Le droit social, le droit individuel et les transformations de l'état* (2d ed.), pp. 3-5, 10-17; *Transformations générales du droit privé*, pp. 9-15; *Revue du droit public*, XXIV (1907), 419.

can arise only from social conditions. They may be acquired only through membership in a society.

To Duguit the basis of law is not subjective but objective and is based on the facts of social solidarity.¹ Conformity to this solidarity is not a rule of ethics but a rule of law. In accordance with these views Duguit opposes the doctrine of unlimited powers of the state or the doctrine of self-limitation of sovereign powers which is, he thinks, a form of omnipotence in disguise. If there are limits on the powers of the state there can be no sovereignty and if the doctrine of sovereignty prevails there can be no limits to state action. The German doctrine of auto-limitation² is regarded as a farce, since the unlimited sovereign who agrees to limits may break his agreement at any time with impunity.³

Therefore, he becomes a defender of the theory of the separation of powers which has prevailed in America and of the practice of American courts in reviewing legislative enactments in order to annul acts which are regarded as contrary to the provisions of written constitutions, or to implied limitations interpreted as inhibiting arbitrary acts. Judicial review of legislative enactments, Duguit believes, follows logically from the theory of the separation of powers.

The philosophy of Duguit is of such interest and significance that brief extracts from his recent work, *Traité de droit*

¹ *Traité de droit constitutionnel*, I, 22 ff. For the contention that except for some surface differences Duguit is stating old doctrines akin to the Natural Rights School, see Charmont, *La renaissance du droit naturel*, p. 98, and *Modern French Legal Philosophy*, p. 131. On the other hand, Duguit insists that a profound difference separates his conception of a rule of society which he calls a rule of right from the former conception of natural rights. See *Le droit social, le droit individuel et la transformation de l'état* (Paris, 1911), pp. 6-9.

² See Ihering's *Der Zweck im Recht* and trans. in *Modern Legal Philosophy*, vol. V; Jellinek's *System der subjektiven öffentlichen Rechte* and *Allgemeine Staatslehre* (1900). Cf. Duguit, "La doctrine allemande de l'auto-limitation de l'état," *Revue du droit public*, XXVI (1919), 161.

³ "The Law and the State," *Harv. Law Rev.*, XXI (November, 1917), pp. 123 ff. For Duguit's criticisms of the dogma of sovereignty, see *Traité de droit constitutionnel*, I, 408 ff.

constitutionnel, will present more effectively his advocacy of a superior law (*droit*) to which all valid positive laws must conform.¹

Presenting the dominant idea of the entire treatise Duguit says:

The older I become, the more I study and search into the problem of the law [*droit*], the more I am convinced that law is not a creation of the state, that it exists independent of the state, that the notion of law is altogether independent of the notion of the state and that the rule of law [*la règle de droit*] governs the state as it governs individuals. It will be seen later that this work is dominated by this idea that the state is limited in its action by the rule of law, that this ought to be the case, that it cannot be otherwise, and that the social order would be impossible if it were not so. Now, this would be impossible if law were an exclusive creation of the state or the rule of law existed only when an economic or social rule is formulated or accepted by the state.²

The characteristic ideas in relation to this higher law are more explicitly developed in sections dealing with laws regarded as contrary to right.³

I call contrary to right every formal law which contains a command contrary, either to a principle of superior right, such as is recognized by the collective conscience of the people . . . or to a provision written in the declaration of rights, or whether finally to a provision of a rigid constitutional law, in the countries, such as France and the United States, which have adopted such a hierarchy of laws. To facilitate the exposition I would qualify simply as an unconstitutional law every law contrary to a superior principle of right, written or not in a law superior to the ordinary law, declaration of rights, or rigid constitutional law. In a word, I use the expression "unconstitutional law," as a synonym of a law contrary to a superior law [*droit*] written or unwritten.

¹ These extracts have been translated and reprinted with the permission of Professor Duguit and of M. de Boccard, editor of his works.

² Duguit, *Traité de droit constitutionnel* (2d ed.), I, 33.

³ *Ibid.*, III, 659 ff. Duguit claims if there is no rule of law (*règle de droit*) above the powers of the state there is no public law and Treitschke's characterization "Der Staat ist Macht" is an unescapable truth. "The Law and the State," *Harv. Law Rev.*, XXXI (November, 1917), 6.

From what I have said . . . it follows that the legislator as a matter of fact does not have the power to create law, that he can only establish and announce constructive rules in order to put them into effect. The logical consequence of this is that a law which is contrary to objective right or which does not have for its end to put into effect a rule of law [*droit*] and to assure its execution is a law without value, a law without executive force.

But one discerns with difficulty the practical means to repress a violation of a law by the legislature. Since the legislature is charged with the duty to formulate the law and to assure its sanction, one can scarcely understand how there can be organized against it a system designed to repress the violations of law committed by it. As will be seen a little farther on, the devices which have been established in France toward this end have proven ineffective. On the other hand, although it is not impossible to accomplish this end in any country, the establishment of a similar organization has been considered only in the countries which recognize the distinction of two or more categories of law in hierarchical form as the United States or as France, where we have three categories of law: the declarations of rights which formulate the superior principles of right or law which cannot be transgressed either by the ordinary legislature or by the constituent legislative body and the constitutional laws which the ordinary legislature can neither modify nor abrogate. In a country such as England, which does not recognize the distinction between constitutional laws and ordinary laws, one never has occasion to think of an organ authorized to test the conformity of laws with right. Besides in England public opinion is the best guarantee against arbitrary legislative acts.

Whether there is or is not in a country an organ authorized to determine the conformity of laws with objective right and to declare of no effect the laws contrary to such right one need not hesitate to accept all of the consequences of the preceding proposition and to say that to refuse obedience to a law contrary to right is perfectly legitimate. It is the principle of resistance to oppression affirmed distinctly by the declaration of rights of 1789 (Art. 2) as one of the natural, inalienable, and imprescriptible rights of man and by the declaration of rights of 1793 in the well-known Articles 33 to 35. When one advocates this proposition he is in general classed as an anarchist, because it is claimed no society would be possible if all of the citizens could refuse to obey laws under the pretext that they are contrary to right. I reply that there are laws to which no one would think of refusing obedience because they formulate or carry into effect a rule of right which is contested by no one. And the affirmation of the right of resistance to

oppression is the best guarantee against the arbitrary power of the legislature which would endeavor hereafter, to make only those laws which would be given an almost unanimous acceptance.¹

That there is a higher law to which all governmental acts must conform whether a constitution be rigid or flexible is Duguit's main thesis. Even in England, he finds, where the omnipotence of Parliament is considered as an essential principle there are superior rules which the conscience of the English people themselves would not permit to be violated by Parliament. The existence of rigid constitutional laws superior to ordinary laws then is regarded, not as the foundation of limits to the legislative powers, but only a positive guarantee, of the restrictive rules which necessarily bind the legislature of the state.

Duguit regards it necessary to go a little further and to say that

every state which recognizes the principle of its subordination to law, which recognizes that there are laws which cannot be enacted in order to respect this principle completely, ought to create a high court having every possible guarantee of independence and of ability and being authorized to annul laws contrary to right, or following a formula less general and less exact, which would be competent to pass on the constitutionality of laws and to annul unconstitutional laws.²

Such high and extraordinary powers, Duguit thinks, ought not to be entrusted to an organ established and controlled on a political basis and because of the political influences dominating French courts he doubts whether they should be accorded such powers.

After describing certain devices in French constitutions to establish special courts to deal with acts regarded as contrary to the constitution and some recent unsuccessful

¹ *Traité de droit constitutionnel*, III, 661.

² *Ibid.*, p. 664.

attempts to revive the plan of a constitutional court Duguit defends the American doctrine as to the review of legislative enactments:

If there is no reason to establish a supreme court before which recourse could be taken tending to have a law held void on the ground of unconstitutionality ought we not to grant courts the authority to consider the constitutionality of a law attacked before them and to refuse to apply it if they judge it unconstitutional? In considering the question theoretically, taking into consideration the nature of positive legislation and the difficulties which arise in practice one must reply affirmatively. The courts ought above all to apply the law — that is to say, to decide in conformity with the law all questions of right which are presented to them. They are bound by the law evidently, by all laws in force in a given country, by the ordinary laws without doubt, but also and for greater reason by the superior laws written or unwritten, particularly by the rules inscribed in the declaration of rights and in the constitutional laws. In a country where there exists such a hierarchy of laws it is incontestably logical that in a case of a contradiction between an inferior and a superior law it is the latter which the courts ought to apply, as a result of which on the same ground they refuse to apply the inferior law. If there is a contradiction between an ordinary law on the one part and a constitutional law or the declaration of rights on the other, the court ought not to apply the ordinary law. Moreover, if there is a contradiction between a constitutional law and a provision of the declaration of rights the court ought to apply the latter and to refuse to apply the former.

Theoretically, then, every person ought to be permitted to contest before any court a law as unconstitutional, that is to say, to be permitted to claim that the law invoked against him cannot be applied by the court because it is contrary to a superior law [*droit*] written or unwritten, to which the ordinary legislature is subordinated.¹

This doctrine follows, in Duguit's judgment, as a matter of course from a written constitution with a theory of a separation of powers. Referring to the provisions which have been interpreted as preventing the French courts from passing on the validity of legislative acts, Duguit believes the doctrine and jurisprudence of the French courts on this matter are clearly wrong. These texts, in his opinion, were only an ap-

¹ *Traité de droit constitutionnel*, III pp. 667, 668.

plication of the principle of the separation of powers and this implies that the judges can consider the constitutionality of laws and refuse to apply all unconstitutional laws. Referring to doubts expressed in the first edition of his treatise that courts might consider the validity of legislative acts, Duguit says:

I was in error and today I accept without hesitation the solution which has been accepted and followed by the eminent jurists which I have indicated. It appears to me evident that it is a necessary and logical consequence of the hierarchy of laws. I consider, moreover, that among the texts of French positive law there is none which is opposed to the recognition of this power as belonging to French courts. On the contrary, as I have said above, the texts which establish the principle of the separation of powers give them this authority implicitly. I may add that a country in which one does not recognize this authority as belonging to the courts cannot directly be said to be under the régime of law. This system has always been practiced in the United States. Certain inconveniences without doubt have been presented in its application, and the Americans are the first to recognize them. These inconveniences, however, prove rather that the difficulty lies in the manner of the practical application of the principle by the American courts and their method of appointment rather than in the system itself. After all, the advantages are much superior to the inconveniences and this is sufficient to require its application in our country.¹

After summarizing some of the difficulties and inconveniences in the application of the American system of the judicial review of legislative acts discovered by Professor Lambert,² Duguit concludes:

Whatever may be thought of political tendencies which may have appeared in the jurisprudence of the American Supreme Court, there is in the power which American courts have to consider the constitu-

¹ *Ibid.*, pp. 673, 674. Cf. Beauregard, *Monde économique* (November seventeenth, 1894), p. 505; Jèze, "Du contrôle des délibérations des assemblées délibérantes," *Revue générale d'administration* (1895), p. 411; Signorel, "Du contrôle judiciaire des actes du pouvoir législatif," *Revue politique et parlementaire* (June, 1904), p. 526.

² Edouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Paris, 1921).

tionality of laws an institution highly protective of individual liberty against arbitrary legislation. I have been able to assure myself that some of the ablest and most independent Americans retain a profound attachment for this institution and that the prestige of the Supreme Court is not growing less in the public spirit. There are some who speak of government by judges. The expression is applied by certain American authors and it is the title which Lambert gives to his work. It is not exact. One cannot say that in America the courts of justice, even the Supreme Court, are truly associated with the government. One cannot even say that they exercise in a true sense control over Congress, or that they can exercise a sort of veto of laws passed by this chamber. These take all their force from the vote of Congress and the promulgation by the President, which alone can exercise a suspensive veto. The Supreme Court following the expression of Larnaude does not pass upon, to speak accurately, the process of the making of a law. It gives a decision to a particular litigant, but this decision requires that the court decide on the constitutionality of the law. Evidently, the constitutionality is considered in this large sense; and the Supreme Court ought not to be blamed, on the contrary, for refusing to apply not only the laws which violate a written rule of the constitution but also a fundamental principle of American law. It recognizes and sanctions a superior law [*droit*] of which I have often affirmed the existence, which imposes itself on every legislator and of which, to their honor, American jurists are unanimous in recognizing the existence and force.¹

The doctrine that the positive rules and enactments of the state cannot interfere with the rights which are pre-existent to all social organization — certain absolute rights which are superior to the law itself, because they are inseparable from human personality — is supported by different groups of French thinkers.² Many agree with Duguit that whenever a law violates a rule of right it should be regarded as an act of oppression and be resisted as such. Law is, then, conceived not as a creation of the legislature; it exists in and of itself.

¹ *Traité de droit constitutionnel*, III, pp. 678, 679. "The American solution creates in a singular manner a positive sanction for enforcement of the obligation resting upon the legislature, namely, to respect the superior principles of right [*le droit supérieur*] imposed upon it." Duguit, "The Law and the State," *Harv. Law Rev.*, XXXI (November, 1917), 18.

² Edouard Lambert, *op. cit.*, Introduction and chap. 11; Wohlgemuth, *Des droits individuels et de leur garantie judiciaire spécialement contre le pouvoir législatif*.

The rule of right gives to positive law its imperative force.¹ Whenever a law conforms to a rule of right it is valid and should be carried into effect; whenever it is opposed to such a rule its enforcement should be resisted, and particularly so when it infringes in a serious way upon the rights of the individual. To establish and preserve such rights it is necessary to maintain the doctrine of limits upon sovereign powers. A number of writers on public law in France believe that the only effective guarantee for individual rights can be established through the judicial control over legislative and administrative acts which do not conform to the higher law or rule of right.² Certain principles formulated in the Declaration of Rights of 1789 are, therefore, considered as immutable and pre-existent to all social organization, and any enactments contrary thereto are necessarily unconstitutional.³ To protect individual rights and to give validity to the written provisions of the constitution it is regarded as necessary to have an unconstitutional law declared inapplicable. In the judgment of M. Wohlgemuth,

this remedy can best be accorded by the courts and this form of judicial control ought logically to follow from the nature of the laws relating to individual rights. . . . In refusing to apply such a law, the judge does not exercise political power, but confines himself to the interpretation of the law, just as he does each day, in the application of ordinary laws . . . individual rights are each day menaced by laws contrary to the rule of right and contrary to the principle of social

¹ Wohlgemuth, *op. cit.*, pp. 22-23. To M. Wohlgemuth, "every act which does not carry into effect a rule of right and which creates a pretended rule of positive law, is theoretically an arbitrary act, without force, and no one is bound by it." *Ibid.*, p. 29. Cf. also H. Berthélemy, "Le fondement de l'autorité politique," *Revue du droit public*, XXXII (1915), 663, 664.

² *Ibid.*, pp. 95 ff.; Hauriou, "Conseil d'état (August 7, 1909)," Sirey (1909), III, 145; Jèze, in *Revue générale d'administration*, II (1895), 241, and *Revue du droit public*, XXIX (1912), 140; Albert Angleys, *Des garanties contre l'arbitraire du pouvoir législatif, par l'intervention du pouvoir judiciaire* (Chambery, 1910); Henri Desfougères, *Le contrôle judiciaire de la constitutionnalité des lois* (Paris, 1910).

³ *Ibid.*, p. 144, and Jules Coumoul, *Traité du pouvoir judiciaire de son rôle constitutionnel et de sa réforme organique* (Paris, 1911), pp. 214, 215.

solidarity. These laws do not have the force of law, if they have not in themselves certain imperative qualities. It is logical as we have insisted for the judge to refuse to apply them. This is one of the established features of democratic government.¹

"We believe, with L. Duguit, that there exists a rule of law [*droit*] anterior and superior to the state, — a rule of law founded on solidarity and on justice. It is from this rule of law that are derived objective law and subjective rights."² According to Guillemon this is not an ideological principle but an enforceable limit on the exercise of state powers. "From this idea that the state is bound and limited by law follows naturally this other idea, that in the case of a violation of law [*droit*], by the state, the subjects have the duty not to obey the illegal acts and even to rebel against the state."³ The criminal code is silent as to the effect of the resistance by an individual to an illegal act of an officer.⁴ Guillemon believes that impliedly the article requires passive obedience. Referring to the comments of Esmein that the principles of the French Declarations of Rights have no constitutional significance today in France,⁵ Guillemon claims that they have a "super-constitutional" significance. There are in France, he asserts, three categories of laws:

- (a) Super-constitutional laws.
- (b) Constitutional laws.
- (c) Ordinary laws.

The super-constitutional laws pertain chiefly to the principles of the Declaration of Rights, which are beyond change by the

¹ Wohlgemuth, *op. cit.*, pp. 149, 150, 156; see also Angleys, *op. cit.*, Pt. IV, and Desfougères, *op. cit.*, pp. 115 ff.

² Pierre Guillemon, *De la rébellion et de la résistance aux actes illégaux* (Thesis, Bordeaux, 1921), pp. 6, 71 ff.

³ Guillemon, *op. cit.*, p. 8.

⁴ Cf. art. 209.

⁵ Esmein, *Droit constitutionnel* (5th ed.), p. 492.

ordinary processes of legislation or constitutional amendment.¹

When such individual rights are violated Guillemon thinks the courts ought to grant a remedy by checking the illegal act.²

Duguit's repudiation of the concepts of natural law, of the personality of the state, and of national sovereignty is criticised by many French jurists as running counter to the almost universally accepted basis of French legal thought.³ Accepting the individualistic basis for natural law Professor Gavet notes how the conceptions of this school have been misinterpreted and then condemned. He finds the development of natural law in the progressive evolution of sentiments of law and justice among men. "We remain," he says, "believers in the natural and imprescriptible rights of man and, therefore, in the law of nations."⁴

¹ Guillemon, *op. cit.*, pp. 10, 11. Cf. art. 11 of Declaration of Rights of 1793 to which a super-constitutional value is attributed.

² See Guillemon, *op. cit.*, p. 12, and the following: Duguit, *Manuel de droit constitutionnel*, pp. 304-307; Reglade, *La coutume en droit public interne*, p. 263; and G. Jèze in *Revue générale d'administration*, II (1895), 411. Cf. also extract from Duguit, *Traité de droit constitutionnel*, II, 13, 14, in which he speaks of the Declaration of Rights as "super-constitutional" law.

Harold J. Laski notes that M. Berthélemy, a French authority on administrative law, adopts Duguit's methods and conclusions, whereas M. Hauriou, another French publicist, seems to reach not very different results. "A whole school of the more brilliant younger jurists, M. Maxime Leroy, M. Georges Cahen, M. Paul-Boncour," he observes, "are clearly influenced at every stage of their work by M. Duguit's speculations. In England and America its influence is already being felt." "A Note on M. Duguit," *Harv. Law Rev.*, XXXI (November, 1917), 188. Cf. M. Hauriou, "Les idées de M. Duguit," *Recueil de législation de Toulouse* (1911), pp. 6 ff., and H. Berthélemy, "Le fondement de l'autorité politique," *Revue du droit public*, XXXII (1915), 663.

³ Gaston Gavet, "Individualism and Realism," *Yale Law Journal*, XXIX (March and April, 1920), 523, 643. Esmein calls Duguit's doctrine "chimère anarchiste," *Éléments de droit constitutionnel* (4th ed.), p. 40. To Hauriou, Duguit is an "anarchiste de la chaire," *Revue du droit public*, XVII (1902), 348, 353, and Michaud regards his theory as "anarchistic and incompatible with social necessities," *Théorie de la personnalité morale*, I, 52. Malberg relegates Duguit's rule of law to the realm of ideal justice or of morality and denies that it has a juridical basis. *Théorie de l'état*, I, 212.

⁴ Gavet, *op. cit.*, pp. 529, 530.

A member of the Positivist School of jurisprudence summarizes as follows the propositions implied in Duguit's writings:

1. That the state is no longer sovereign.
2. That the doctrine of the unity of the state is inconsistent with modern associational tendencies.
3. That in legal no less than in political theory law is justified by reference to the end which it serves.
4. That there is a *droit objectif* superior to all governments and legally binding them.
5. That the rulers are under a legal duty to govern well, but have no legal right to govern.

Justice Brown criticizes these propositions in turn and claims Duguit's *droit objectif* is merely the concept of natural law socialized, and that the basis of his legal thought involves "a hopeless confusion of legal and moral ideas." Though most Positivists in France and elsewhere unhesitatingly reject the main tenets of Duguit's legal philosophy, his writings have had a profound effect on all current legal thought.¹

Gemy thinks that Duguit in effect turned again to the essential idea of natural law only under a new form,² and that seemingly repudiating the metaphysical approach to the law he constructed a system essentially founded on vague metaphysical hypotheses. Referring to Duguit's principle of social solidarity Saleilles calls it a "principle of natural law after all" according to the accepted terminology of this phrase.³

¹ W. Jethro Brown, "The Jurisprudence of M. Duguit," *Law Quarterly Review*, XXXII (April, 1916), 168, 172, 179-181.

² *Science et technique en droit privé positif*, II, 191, 252, 262-264, and IV, 159 ff.; for similar conclusions, see M. Deslandres, *Revue du droit public*, XXV (1908), 10; J. Charmont, *La renaissance du droit naturel* (Paris, 1910), pp. 198, 199; and W. Y. Elliott, "The Metaphysics of Duguit's Pragmatic Conception of Law," *Political Science Quarterly*, XXXVII (December, 1922), 637.

³ Gaston Jèze objects to Duguit's deductions because, as he sees it, he fails to distinguish between "le droit positif" and "le droit naturel." *Les principes généraux du droit administratif* (3d ed., Paris, 1925), p. 33. Duguit replies to his critics in the *Traité de droit constitutionnel*, I, 17, 35, 59, 397, 497, and II, 68.

However one may classify the *règle de droit* it is one of the most interesting and important forms of higher law philosophy which are affecting European political and legal thinking.

M. Hauriou is among those in France who defends the doctrine of a higher law above ordinary written enactments and constitutions. He speaks in defence of this doctrine under the title *superlégalité constitutionnelle*. "It is an error," he thinks,

to believe that the *superlégalité constitutionnelle* comprehends only that which is written in the constitution; it comprehends equally other things, as for example, all of the fundamental principles of organization, that is, all the principles of the individualistic order which are at the basis of the state and the political principles on which governments are founded . . . these principles constitute a sort of *légitimité constitutionnelle*, and which have force over and above even the written constitution.

Despite the failure of the constitution of 1875 to include a bill of rights, Hauriou says:

the principles of our public liberties are not in the written constitution; this is certain, but they are, however, in the *superlégalité constitutionnelle*, for they are part of the *légitimité constitutionnelle*, which is above the written constitution itself. . . . This is very important, for it signifies that no one's liberty can be completely suppressed either directly or indirectly by the establishment of the state monopoly.¹ Other principles can also be ranged in the category of *légitimité constitutionnelle*; the principles of equality and of publicity in taxation, and the principle of the separation of powers between the administrative and judicial authorities.²

It is quite necessary, Hauriou concludes, to substitute for the narrow conception of the written constitutional law that of a *superlégalité*, which allows an addition to the constitu-

¹ *Droit constitutionnel* (Paris, 1923), p. 298; also by same author, *Précis élémentaire de droit constitutionnel* (Paris, 1925), pp. 81 ff.

² In the United States, Hauriou believes, that where the control of the constitutionality of laws is confided to the judges, they have progressively developed "the absolute legitimacy of the individualistic principles of the ancient Anglo-Saxon common law." *Précis élémentaire de droit constitutionnel*, p. 82.

tional text of all the fundamental principles of the state understood as forming a *légitimité*. Hauriou practically agrees with Duguit in supporting the doctrine of a law superior to the state and also the principle that the courts should review legislative acts to test their conformity with the terms of written constitutions. In a limited manner Hauriou and Duguit take the judiciary out of its normal and classical position and set it up as the power of ultimate sovereignty.¹ With certain reservations they approve the American doctrine of judicial supremacy.

3. *Higher Law Doctrines of Krabbe*. H. Krabbe, the Dutch juristic philosopher, discarding an omni-competent sovereign which is the basis and source of law, defends the proposition that positive law is valid only by virtue of the fact that it incorporates the principles of right (*Recht*).² The principles of right are then traced to what Krabbe regards as the feeling or sentiment of the people. In contrast with a sovereign who alone can make law he formulates a theory of the sovereignty of law.³

There is [according to Krabbe] only one source of law, — the feeling or sense of right which resides in man and has a place in his conscious life, like all the other tendencies that give rise to judgments of value. Upon this all law is based, whether it be positive law, customary law, or the unwritten law in general. A statute which does not rest upon this foundation is not law. It lacks validity even though it be obeyed voluntarily or by compulsion. It must be recognized, therefore, that there may be provisions of positive law which lack real legal quality.

¹ *Principes de droit public* (2d ed., Paris, 1916), pp. 31 ff., and *Précis de droit administratif et de droit public* (9th ed., Paris, 1919), p. 996.

² *Die Lehre der Rechtes-souveränität* (1906), and *Die moderne Staatsidee* (1919); the latter has been translated in *The Modern Idea of the State*, with an Introduction by George H. Sabine and Walter J. Shepard (New York, 1922).

³ *The Modern Idea of the State*, pp. 8, 9, 39 ff. Cf. also W. W. Willoughby, "The Juristic Theories of Krabbe," *American Political Science Review*, XX (August, 1926), 509. We find in Krabbe as in Duguit, says Willoughby, the same mistaken idea, "that an inquiry into the idealistic or utilitarian validity of law, as determined by its substantive provisions and the purposes sought to be achieved by its enforcement, has a relevancy to, and that its conclusions can affect, the validity and usefulness of the purely formalistic concepts which the positive or analytical jurist employs."

The legislative organ runs the risk of enacting rules which lack the quality of law either because the organization of the legislature is defective or because it mistakes what the people's sense of right demands. On the other hand, it may happen even more easily that what is embodied in a statute ceases to be law and so is no longer valid because it has lost the basis of its binding force. In such a case compulsion, — the punishment or legal judgment which disobedience to the statute entails, — is irrelevant. Constraint is justified by the necessity of maintaining the law but it can never bestow legal quality upon a rule which lacks it. Mere force, whether organized as in the state or unorganized as in an insurrection or revolution, can never give to a rule that *ethical* element which belongs essentially to a rule of law. On the contrary, constraint can gain an ethical quality only when used in the service of law. Thus the rule must have the definite character of law and can derive this only from the feeling or sense of right which is rooted by nature in the human mind.¹

There is, in the opinion of Krabbe, only one ruling power — the power of law. Along with other modern juristic writers he predicates an ethical and moral basis for law. We are convinced, he says, "that in basing the validity of law upon the sense of right we stand upon the firm foundation of fact, — only by establishing the authority of law in this manner, moreover, can full account be taken of the *ethical* character of law."²

Finding that there is no place for a sovereign in modern society and that law may not be traced to any such source, Krabbe seeks a basis of law which is regarded as better fitted to the views of modern social life.

His theory involves an insistence on the ethical foundations and emotional sanctions for law, on the theory that the real source of law is in the "sense for right" or "feeling for right." The spiritual sense of man is regarded as the support of law and legal thinking. The intellect, it is claimed, must lose its

¹ Krabbe, *The Modern Idea of the State*, pp. 47, 48. Krabbe insists that "the whole legal system under which people live finds the basis of its authority, its binding force, and its effectiveness in the operation of the feeling or sense of right." *Ibid.*, p. 126.

² *Ibid.*, p. 49.

primacy in the development of law; feminine emotionalism must offset masculine intellectualism.¹ The so-called sense of right, it is contended, has binding force, and rules not based on it are not law. The inherent obligatory authority arising therefrom is due to its emanation from an absolute, or from what is conceived as universally valid standards of right and of law. These valid standards are built on a uniform standard of right which exists in each individual, though the idea or the expression of the sense of right may be obscured by unfavorable circumstances.²

In order to secure unity from a diversity of opinions as to the "sense of right" superior sanction and validity is attached to the opinion of the majority. That "rule is to be obeyed which has quantitatively the highest value." In order to render feasible the rule of the majority it is contended that the majority sense of right must be conceded to be better for the minority than their own interpretation. There is an emphatic denial of supremacy or of superior power through organization. This is indicated in the dictum "no power on earth can control the action of the sense of right." There is then no authority other than the law. Law is defined as the judgment of the community on the rightness or wrongness of conduct.

In comparing the theories of Duguit and Krabbe it is apparent that both reject eighteenth-century natural rights theories and the absolute sovereignty theory, as bases of law and of legal principles. Both claim that the legal foundation which is described is developed from facts and a logical interpretation of social phenomena. Each in turn condemns the Positivist's theory of the state with its accompanying legal dialectics. Both believe in the superiority or "sovereignty" of rules of right (*droit* or *Recht*).

¹ Krabbe, *The Modern Idea of the State*, p. 197.

² *Ibid.*, p. 88.

Krabbe does not clearly dispose of implications which result from the enactment of positive laws which lack true legal validity, such as the attitude of the individual toward a positive legal rule which does not conform to the sense of right or the duty of officers toward a statute contrary to popular conceptions of right. Apparently the author regards the feeling or sense of right as an ideal or standard toward which actual laws may only approximate. Though he does not advocate explicitly a doctrine of natural law he finds the source and sanction of all positive laws in a higher law doctrine which has certain similarities with the theories of natural law and of inalienable rights. This theory, however, differs in the source and foundation of these rights, tracing them directly to the people, rather than to any immutable and absolute standards to which man's legal concepts must conform.

Discarding the concept of sovereignty for the state in the field of private law and basing all law on the sense or feeling for right Krabbe predicates a similar foundation for international law.¹ The difference between national and international law results chiefly from the fact that the latter is applicable to a larger domain and that in the international realm the sense of right is immature.²

¹ Cf. Krabbe, *The Modern Idea of the State*, chap. 10.

² *Ibid.*, p. 247; cf. also Edwin M. Borchard, "Political Theory and International Law" in C. E. Merriam and H. E. Barnes, *A History of Political Theories, Recent Times* (New York, 1924), pp. 130, 131.

For a criticism of the views of Krabbe by a modern exponent of the Positivist or Analytical School, see Willoughby, *op. cit.*, pp. 520 ff.

CHAPTER XI

REVIVAL OF NATURAL LAW IN METAPHYSICAL AND THEOLOGICAL SPECULATIONS; NATURAL LAW THEORIES AND INTERNATIONAL LAW

THE modern revival of natural law theories is the result of a variety of tendencies in legal, political, and moral thinking. Jurists of the most diverse points of view, inclinations, and interests join in the advocacy of higher law theories. One of the foremost movements in modern thought which is bringing natural law out of its seeming state of disrepute is connected with renewed efforts to seek the sources and sanctions for legal rules in religious and metaphysical speculations. Taking as a standard the mediaeval concepts of natural law, when jurisprudence was a branch of theology, and following the metaphysical analyses of Thomas Aquinas in relation to law, modern juristic writers, mainly adherents of the Catholic faith, aim to restore natural law again to its position of primacy in the political and legal world. In fact, certain phases of the Thomist system, namely, that natural law was "nothing else than the rational creature's participation in the eternal law" and that it comprised rules of conduct essentially prescribed by the Creator, have never ceased to be one of the main tenets of thought among jurists interested in theological speculations. During the nineteenth century, when the natural rights philosophy was repudiated by politicians and by certain jurists the ancient theories, as molded under mediaeval influences, continued to receive careful analysis, exposition, and defence by Catholic writers.¹

¹ See Tancredè Rothe, *Traité de droit naturel théorique et appliqué*, 6 vols. (Paris, 1885-1912). Rothe's work indicates in its incomplete form the inclusive features of

We can make no greater mistake [says Dean Pound], than to suppose that the speculations of the metaphysical jurists were without practical effect upon the law. We should be put on our guard, if by nothing else, by the wealth of literature from this standpoint in the first three quarters of the century. When a popular exposition thereof, such as Ahrens' *Cours de droit naturel*, could go through twenty-four editions in seven languages between 1837 and 1892, men must have been finding satisfaction in the metaphysical theory of law in more lands than one.¹

1. *Natural Law Doctrines of Del Vecchio.* There are evidences of a return to natural law theories in most of the European nations but in none is the tendency more marked than in Italy, where the Catholic or Traditionalist School has had a prominent position in legal thought.² Among the many Italian advocates of the theories of natural law Professor Georgio del Vecchio of the University of Rome is a leader among an active group who aim to turn juristic philosophy in the direction of higher law ideas. Del Vecchio insists that there must be in jurisprudence an element not derivable from

natural law as conceived by certain Catholic writers. Among the subjects considered in the six volumes of the treatise are: the definition and nature of law and the state; the duties of men towards others and towards God; the relations of the individual to government; marital relations, the family and education; social and individual services, including the conditions and the rights relating to labor; and the rights of corporate organizations of labor and capital. A theological school composed of Protestants and Papal representatives led a reaction against the autonomy of the reason in religious, moral, and legal matters. For a defence of a metaphysical basis for natural law and for the philosophy of law, see Boistel, *Cours de philosophie du droit* (1899), Appendix.

Vareilles-Sommières, Dean of the faculty of law of Lille, in his *Les principes fondamentaux du droit* (Paris, 1889), divides the laws which are directly divine into natural laws and positive divine laws: "the natural laws are those which result as necessary consequences and as [*forcement*] willed by God, from the nature which he has given to us, and which manifest themselves to our reason alone. . . .

The natural laws are universal and immutable since they are the necessary result of the nature of man and of those beings with whom he is in relation." Pages 20 ff.

Cf. also Theodor Meyer, *Institutiones iuris naturalis*, 2 vols. (1886-90).

¹ *Interpretations of Legal History*, p. 33.

² Vico frequently referred to the idea of a law of nature. He was one of the first to insist that it was not a fixed but a progressive law — "a law varying with the stage of growth reached by a given community." Cf. G. de Montemayor, *Storia del diritto naturale* (Naples, 1911), especially chap. 11; Croce, *The Philosophy of Vico*, trans. by Collingwood (London, 1913); Benvenuto Donati, *Domat e Vico, ossia del sistema del diritto universale* (Macerata, 1923).

experience and he conceives a natural law based upon the common elements in man's nature.¹ The war against natural law concepts, unless it aims merely to correct errors and omissions, he regards as unjust and irrational. To him the conception of absolute justice is one of the fundamental needs of the human mind. Says del Vecchio:

Natural law exists, therefore, as a system of the highest truths, not sensible but rational, and is, then, independent of the existence of common institutions in all nations . . . the idea of natural law, which has withstood the attacks of skeptics and empiricists of past times will resist those of modern positivists, and will guide humanity in the future.²

Del Vecchio conceives as a universal element in the law what he calls its logical form (*Forma dat esse rei*). This logical form is a metaphysical and an *a priori* essence of the law. On the basis of these norms certain principles of law are regarded as deducible *a priori* from human nature.³ Natural law is not, then, merely rationalized law; it constitutes "a special order of juridical rules founded upon a definite criterion." In predicating these universal norms of legal reasoning Del Vecchio suggests a philosophical basis similar to the fundamental principles and the abstract rule of reason permeating much of American constitutional law.⁴

Del Vecchio explains in detail the prevalence, in the Italian system of law and in other legal systems based essentially on Roman ideas, of principles of law or of basic notions which condition all legal thinking.

¹ *I presupposti filosofici della nozione del diritto* (1905); *Il concetto del diritto* (1906); *Il concetto della natura e il principio del diritto* (1908), translated under the title *The Formal Bases of Law* in Comparative Legal Philosophy Series, X (Boston, 1914); cf. chap. 3.

² *The Formal Bases of Law*, p. 18.

³ *Ibid.*, pp. 76 ff., 258, 321, 333. For citations to Italian articles and works defending natural law, see *ibid.*, p. 19.

⁴ See H. J. Randall, "An Italian Exposition of the Law of Nature," *Law Quarterly Review*, XXXIII (April, 1917), 161.

Besides the multitude of special laws and of the decisions relating to particular cases and to definitely determined relations, there exists in our legislation [he says] notably in the Constitution and in part also in the preliminary provisions of the Civil Code or in other laws, positive affirmations of a general character which reflect in a measure more or less large, the rational elaborations concerning the law accomplished by the preceding schools of philosophy.¹

Permeating the Code, legislative acts, and the interpretations of the judges are the applications of such natural law concepts as the principle of equality before the law, the respect for persons or individuality, the right of privacy, the right to use one's faculties, and the right of property.² The peculiar results derived from the applications of these concepts, it is claimed, can by no means be understood by reference alone to the formal provisions of the laws. But rather,

there are, among all peoples, some fundamental convictions regarding modes and aims of conduct, which represent the common exigencies of human nature, displayed according to the degree of their development, and in relation to certain elements of outward fact. Such convictions determine generally all the forms under which life shows itself, and accordingly the juridical system among others, although they are not found written in the provisions of any code.³

The historical basis of right arises, Del Vecchio believes, from the exigencies and aspirations of individual consciences. But it is not an entirely variable concept, rather a form of right, which, "analogous to that of morality, does not depend on facts, but rather tends to control them; whence neither can it be limited by the institutions actually in vigor, of what-

¹ "Sui principi generali del diritto," reprint from *Archivio Giuridico*, XXXV, 4th ser., vol. I, fasc. 1, pp. 21 ff. I am indebted to Professor Del Vecchio for reprints of several of his articles and lectures on natural law. He has kindly consented to the use of translations of portions of his "Sui principi generali del diritto."

² Del Vecchio, *op. cit.*, pp. 34-42.

³ Georgio Del Vecchio, "Positive Right," *Law Magazine and Review*, XXXVIII (May, 1913), 297.

ever kind they may be; rather it sets its affirmations naturally beyond these, and sometimes against them."¹

When the rules of positive law come into conflict with the principles of natural law, Del Vecchio asserts, it is the duty of the judge to apply the positive rules. In such a case the principles of natural law, in his judgment, remain alive and active and in the end will be recognized by the positive law.² Formal rules and maxims contrary to reason may be imposed temporarily but in the end equity, reason, and good faith will prevail despite formal prescriptions to the contrary.

The following extracts will indicate Del Vecchio's point of view in his effort to revive interest in natural law principles of a metaphysical type, somewhat similar to the Kantian hypotheses.

The idea of the natural right [law] is truly one of those which accompanies humanity in the course of its history; and though some schools, as it has happened very often, especially in our day, try to exclude it or to ignore it, the idea is affirmed powerfully once more in life. Consequently, it is rationally incorrect to try to discard it, and it is still more so when it is a question of interpreting a legislative system, under the dominance of this idea. Of this we have the proof, not so much in the preparatory works of which we would not want to exaggerate the importance from the standpoint of interpretation, as from the fact that our legislation concerning private law, is derived for the greater part from the Roman law, entirely developed about the idea of *naturalis ratio*, and that concerning public law, from the constitutional systems of England and of France which have for their fundamental bases a Bill of Rights and a Declaration of Rights, real and typical expressions of *jus naturae*.

Whatever judgment the interpreter wishes to make from his point of view on this great doctrinal tradition, and on its actual significance, which is by many signs shown to be inexhaustible, one cannot, however, deny that this doctrinal tradition had a real existence and a vigorous efficacy at a time which corresponds to the formation of our present legal system. Hence the necessity of not neglecting its study

¹ Del Vecchio, "Positive Right," *op. cit.*, p. 306. *Positive right* is that which at any given moment effectively governs the life of a people and hence is not restricted to rules established by statute.

² *The Formal Bases of Law*, pp. 52 ff.

and running the risk of refusing to understand the real and exact significance of the system.

This study, which integrates that of the particular norms to which we have already alluded, constitutes also a check as well as an aid for individual thought in the reconstruction of the law now in force. It facilitates above all the seeking for origins concerning this part of the general principles of law which the legislator had the opportunity of recognizing and of formulating, without, however, giving them a complete and definite expression; also, this study makes easier the seeking for the principles which are not formulated, but which nevertheless actually exist in the system, where they are buried, so to speak, under the mass of particular norms, which are derived more or less from the application of these rules. The tie which exists between the general theories of law that prevail in the thought of a given period, and in the legal provisions which, in the same period, are organized and drawn up, can be discovered more or less direct, and more or less easy. Such a tie must exist, if it be true that the world of civil affairs has been made by men, and consequently these principles must be found in our human mind; in other words, if the human mind gives birth to the law as a phenomenon and as an idea. It is easy to understand, therefore, that the work of the interpreter, when he tries to comprehend and to integrate a system determined by history, cannot be wholly evolved from within, that is, arbitrarily and individually; it cannot consist in the affirmation of a natural right "which each one shapes for himself according to his individual whim," against which the logic of the jurist would have good reason to protest. The appropriate support and assurance, in our quest for principles, are given us by the entire general theories which envelop the law and which are not the artificial work of an individual thinker, but which correspond to a strong and true scientific tradition intimately linked in the genesis of the laws actually applied. And this consideration which is necessary to give to the doctrinal traditions does not prevent the elaboration of the ulterior elements which compose the whole; on the contrary, it facilitates their interpretation, in the sense that it indicates, by means of principles already assured, the direction in accordance with which their progress and ulterior development should move.¹

The school of natural law intended and intends essentially to uphold the non-arbitrary character of the law, that is to say, the existence of a necessary relationship between the intrinsic substance of things and between the rules of law which are connected with them.

¹ "Sui principi generali del diritto," pp. 23-25, or "Les principes généraux du droit," trans. into French by E. Demontes with a Preface by R. Demogue (Paris, 1925), p. 25, or "Die Grundprinzipien des Rechts," trans. by Albert Hellwig, pp. 24-26.

Even the principle upon which we are all particularly agreed, the principle of the innate and absolute right of the individual, agrees with this fundamental tendency; by this principle, in fact, one affirms that the true nature of man implies an element of transcendentalism, a faculty which cannot be suppressed, and which is consequently inalienable, to dominate the order of phenomena and to find in itself its own determination, in a word, to affirm the autonomy of the human being. The law cannot fail to recognize such a fact, nor refuse to take from it all the consequences and applications which are in its wake.

According to the same criterion the way is open for the research of law corresponding to each kind of juridical reality, in so far as it contains relations between individuals. This inquiry, which is accomplished by means of the reason ("ex ratiocinatione animi tranquili"), as Thomasius said, has its normal period of comparison in the positive juridical rules which represent already, in fact, an attempt at a solution of the same problem. Numerous cases, and especially when it is a question of recognizing purely logical necessities of the immediate exigencies of our being, and of conditions of natural law, or of the *naturalis ratio*, manifest themselves, in a given moment, as elements of the positive law and form precisely its substratum, a substratum which is retained, and which is transmitted, through the changes of positive law. That, for example, no one can transfer to any one else more right than he himself enjoys; that it is legal to oppose strength and that, consequently, every one has the privilege to defend himself against any aggressions; that, in all matters, the advantage must belong to the one who has been inconvenienced; that no one can enrich himself unjustly at the expense of others. All these criteria, and many others that are similar to them, come from the natural juridical reason and have been in a sense already stated by the Roman jurists. They indicate the formative principles of the laws actually in force today, whether these laws express these principles precisely, or whether they are regarded as implied in the form of maxims, the disappearance of which would cause many particular legal provisions to lose all of their meaning.

The necessity of having recourse to such criteria and, in general, to the natural juridical reason, is kept very active and very urgent by the incomplete nature which inevitably belongs to the positive law; it is so urgent, indeed, that one could not avoid such a recourse even if an expressed reference to general principles similar to the one offered by Art. 3 of the preliminary provisions of the Italian Civil Code, were lacking, as it happens in other systems (for instance, in the Code Napoleon and in the German Civil Code). This fundamental exigency which inspires the theories of natural law and which

is called, in a wider sense, "equity," a consideration of all the elements of reality necessary to determine the equilibrium in the transactions between two persons, cannot be repudiated by positive legislation. This legislation itself, after having attempted to supply what is necessary in a measure for such an exigency, must admit finally that it is directly applied through the conscience alone of the judge, in all cases not determined by precise rules, nor likely to be determined by them, at least by analogy. It is noteworthy that, in certain cases, the legislator himself abstains deliberately from fixing a rule and acknowledges that he has recourse to this criterion of natural reason, which is presupposed as the intrinsic basis of law.¹

The ancient adherents to doctrines of *jus naturale*, Del Vecchio thinks, were wrong in so far as they attempted to identify natural law with the laws common to different peoples and hence the reaction of the empiricists resulted in an over-emphasis on the historic variability of law. This conflict, it is thought, is obviated by conceiving a series of positive laws as

unified by the tendency toward the development of natural law. This tendency, grasped by the mind *a priori* as an absolute and universal necessity, superior and anterior to any application in experience, develops through a long and laborious historical evolution. This should not be taken to mean that natural law begins to be true or becomes law only at the moment when it is recognized and actualized (for this would throw us into the old error); the additional positive recognition does not result in value or truth, but is, at the most, a consequence or result of its value or truth. Observance or non-observance *per se*, as facts of the empirical order, do not affect the intrinsic significance of the principle, which is essentially transcendental, and which is self-sufficient in its sphere regardless of its unrecognition or violation in fact.²

It is difficult for one trained in Anglo-American legal ideas and traditions to appreciate or understand the point of view

¹ "Sui principi generali del diritto," pp. 47-49; "Les principes généraux du droit," pp. 50-52.

² *The Formal Bases of Law*, p. 326. For other recent Italian interpretations of natural law, consult G. Brunetti, "Il diritto naturale nella legislazione civile," *Rivista del diritto commerciale*, XX (1922), Nos. 8-9, and M. Cordovani, "Il diritto naturale nella moderna cultura italiana," *Rivista internazionale di filosofia del diritto*, IV (1924), No. 2.

of Del Vecchio. But it is a point of view through which alone much of the legal thinking of Continental European nations becomes intelligible. Though the traditionalist or metaphysical approaches to an understanding of the law have had little vogue in England and in America, these legal systems have been far from free from metaphysical or transcendental legal notions.

Among the many modern exponents of religious and metaphysical theories of natural law only a few can be briefly mentioned. A summary of some of the views of a few representatives of this school may suggest the characteristics of the higher law philosophy in its religious and metaphysical garbs.

2. *Theological Interpretation of Natural Law by Victor Cathrein*. One of the special advocates of the religious and metaphysical approach to natural law is Cathrein.¹ Cathrein classifies the opponents of the natural law philosophy in three groups: first, *The Evolutionists*, comprised of pantheistic monists such as Paulsen, Wundt, Kohler, and Berolzheimer, or of materialists such as Darwin and Spencer, or the economic determinists such as Marx and Engels — all of whom deny the existence of concepts or principles of general and immutable value; second, *The Empiricists*, such as Binding and Merkel, who recognize concepts and general principles but pretend to discover them through the sole avenue of pure experience and comparison; and, third, *Formal a priorism* of the kind of Stammler, who, following the inspiration of Kant, wishes to bring back the immutable essence of law in a pure form, exclusive of all predetermined content.²

Cathrein contends, in opposition to these tendencies, that every science and notably juridical science implies the neces-

¹ V. Cathrein, *Recht, Naturrecht und positive Recht, Eine kritische Untersuchung der Grundbegriffe der Rechtsordnung* (2d ed., 1909). Geny speaks of this work as "imbued with the pure tradition of the Catholic Church," *Science et technique en droit privé positif*, II, 295; see also G. Platon, *Pour le droit naturel — A propos du livre de M. Hauriou; Les principes du droit public* (Paris, 1911).

² *Op. cit.*, pp. 14 ff., and Geny, *op. cit.*, II, 301.

sity of concepts and general principles, in reality recognized by all, even by those who pretend to deny their existence.¹ Referring to the point of view of Savigny and of the Historical School that the real source of law is to be found in the spirit or conviction of the people Cathrein claims that if one denies that there are general principles of law controlling the actions of men, one is led in a sort of circle to a supreme source of law in a "general consensus of right," the "convictions of the people," or custom.² And these sources do not in fact carry one to the real origins of law, for natural law is "the indispensable foundation of positive law, since without it, one cannot conceive of any regular authority or of any legal protection, of which the state is the necessary instrument."³

Law is an essential part of the moral order to Cathrein and from the concepts of the moral order juridical systems are evolved. Tracing the ultimate sources of law to divine origins he embodies much of his analyses in obtuse theological and supernatural notions which have tended to discredit the work among jurists inclined to view their field scientifically and practically.⁴

The position of Cathrein as to natural law may be summarized as follows: There is a law of nature which governs the life of man, whether it is discovered and followed or whether man attempts to defy it; God is the primary source of this natural law and its secondary source is in its revelation of its principles to man; all human enactments to be valid are merely declaratory of this law.⁵ This natural law (*Recht*) is

¹ *Op. cit.*, pp. 16-41, and Geny, II, 302. For approval of Cathrein's views by Geny, see II, 307 ff. Cf. also Gutberlet, *Ethik und Naturrecht* (3d ed., 1901).

² *Op. cit.*, pp. 145 ff.

³ *Ibid.*, pp. 252, 253.

⁴ Geny thinks supernatural theorizing is not an essential part of Cathrein's work and he refers to Boistel and Cathrein as modern representatives of the classical conception of natural law. *Op. cit.*, II, 350.

⁵ For a similar method of analysis, see James Lorimer, *The Institutes of Law: A treatise of the Principles of Jurisprudence as Determined by Nature* (2d ed., London, 1880).

the indispensable foundation of positive law. It is universal and immutable. Though its rules may be discovered by reason, they do not arise from reason but from the superior will of the Creator.¹

Contrasting the modern German political-historical thinking with the characteristics of West-European and American political thinking, Ernst Troeltsch finds two lines of thought dominant in Western Europe — one progressive, democratic, and revolutionary; the other conservative, aristocratic, and authoritative — both based upon the Ancient and Christian ideas of an eternal-divine natural law. These ideas involve doctrines of the homogeneity of human beings, of the uniform destiny of humanity, and an abstraction of equality among men. Though many Germans, Catholics and Lutherans alike, follow the conservative, aristocratic, authoritative tradition, there is a new school which supports a religious-aesthetic ideal placing the emphasis upon the individual human intellect as a positive and creative force. In opposition to the rule of reason in the creation of the state and doctrines of equality and homogeneity among men, these modern German thinkers would found social and political organizations on individualistic and pluralistic hypotheses. In this romantic ideology natural law, whether progressive or conservative, has little place.²

3. *Metaphysical Doctrines of Geny.* Based only partially on religious and doctrinal grounds a more effective exposition and defence of natural law principles from the metaphysical standpoint are to be found in the writings of François Geny.

A modernized form of the version of natural law of St. Thomas is in *The Catholic Encyclopaedia*, where natural law is regarded as comprised of three constituents: first, a *discriminating norm*, which is of the essence of human nature itself as a reflection of the divine nature; second, a *binding norm*, which is evidenced in the divine authority requiring that individuals live in accordance with the first norm; and third, a *manifesting norm*, which is the result of the efforts of reason to determine the moral qualities of actions as limited by the first norm.

¹ *Op. cit.*, pp. 222 ff.; Geny, *op. cit.*, pp. 314 ff.

² Ernst Troeltsch, *Naturrecht und Humanität in der Weltpolitik* (Berlin, 1923).

Geny, who like Duguit ranks as one of the foremost jurists of France, has been laboring many years to have his countrymen value more highly the superior law concepts, which he conceives as the source and sanction of positive law. The former rationalist type of natural law, Geny thinks, suffers from an "aridness of analysis" and needs to be supplemented by "the pliant and rich fecundity of intuition."¹ In fact Geny, along with others of the Metaphysical School, gives much emphasis to the rôle of intuition, or what is termed "intuitive understanding," in the determination of the ultimate purposes and the end of the law. Man, considered as he is, living amidst nature and society, finds himself, according to Geny, surrounded by an ensemble of "necessary relations which are derived from the nature of things." These arise from the physical, psychological, moral, social, as well as the metaphysical or transcendent factors which control and confine human actions. From these factors arise *natural laws*, some of which are transcendent to all experience. Man can acquire a knowledge of these transcendent rules and can be guided by them, though he cannot successfully resist them. To Geny these natural laws have a distinct relation to the religious and moral life of man.² The fundamental problem of the jurist, no matter under what forms it may be disguised, Geny thinks, is "the eternal problem of natural law [*droit*]. And while the doctrines of natural law have taken various forms, some of which continue to hold sway today, one no longer pretends to build through reason an ideal system of law, eternal and immutable, which is equally applicable to all times and all countries."³

¹ *Op. cit.*, I, 16. He agrees with Phillipson that "as in science, metaphysical entities are being more and more imported, so in the sphere of law will those principles of natural law come to be more and more emphasized, through the ineradicable promptings of the intuitive consciousness of men and of states." *Great Jurists of the World*, p. 343.

² *Op. cit.*, pp. 43, 44.

³ *Ibid.*, II, 10, 12.

Though Geny recognizes a theoretical supremacy of natural law and suggests that in the case of an absolute conflict natural law must be superior to the written law he realizes the impracticability of this conclusion,¹ and he says, "I believe for myself, that plain good sense, elementary observation, and universal testimony, acknowledging the primary necessity of order and recognizing that order can be established only by a rule emanating from an effective authority, suffice amply to justify to the reason the legitimate preëminence of the written positive law."² The main obstacle, he thinks, which prevents the maintenance of the principles of natural law when they come into conflict with the positive written law is that these principles of natural law, however firm their basis, consist only of general directions of conduct. They are too abstract and too evanescent for the concrete circumstances of social life, especially when they clash with the definite judgments of formal authorities. It is his belief that this vagueness can in part be overcome by bills of rights in written constitutions wherein are expressed the essential principles of immutable natural law. This expedient, however, is regarded as unsatisfactory, for either the written constitution becomes over-rigid and an obstacle to legitimate progress³ or it loses its rigor in an indefinitiveness that discredits the value of a written instrument.⁴

In his judgment, however, a rigid constitution judiciously used and broadly interpreted might be useful, if it could be given an effective sanction and if its precepts could be placed beyond the reach of ordinary law. Hence some method must be found to temper practically "the brutal power of the written laws, in order to stop their action or impair their

¹ *Op. cit.*, IV, 72 ff.

² *Ibid.*, p. 78.

³ Cf. criticisms by Edouard Lambert on the practice of interpreting the general and vague phrases of written constitutions in the United States in *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Paris, 1921).

⁴ Geny, *op. cit.*, IV, 87.

results every time that they attempt to interfere with justice, to slight the objective factors of the social life, or to pass beyond the injunctions or prohibitions of natural law.”¹

Among the devices to temper arbitrariness in the enforcing of the law Geny commends the “exception d’inconstitutionnalité,” the declaring of a law invalid by the judiciary, which he believes could be adopted, in a measure at least, without contradicting any essential principle of French public law. On the contrary it is his judgment that such authority wielded by judges would serve to assure a guarantee of the indispensable application of the principles of public law.² Admitting the difficulties and the weaknesses of the American plan of judicial review of legislative enactments to test their validity, which has led critics to speak of it as a “government by judges,” Geny concludes that the organization of the judiciary in France and the traditions of the country would prevent such excesses and that it would be in “perfect harmony with the essential bases of the French constitution” to adopt a similar plan. To those who claim that the existing courts of France would be unequal to the responsibilities of so great a power and that a special court should be created for this purpose, Geny replies that such a proposal is wholly unnecessary and that from every standpoint the matter could be left to the jurisdiction of the regularly established tribunals.³

Where no effective means are provided to check arbitrary authority on the part of the government Geny regards the right of resistance as legitimate, but the right must be surrounded by some obvious limitations in the direction of maintaining the individual rights of man. Admitting that when a conflict arises between positive law and natural law, positive law must prevail, he aims to modify the rigor of the strict enforcement of the written law and to suggest remedies whereby the flagrant injustice of its provisions may be pre-

¹ *Ibid.*, pp. 81 ff.

² *Ibid.*, IV, 91.

³ *Ibid.*, pp. 101, 102.

vented. In his judgment every possible device should be provided to check abusive applications of the law, which may lead, if not prevented, to forcible resistance.

To keep governmental agencies within reasonable bounds Geny says he agrees with Duguit and Hauriou that it is necessary to establish superior principles of law and right as a restraint on the majorities who make the law.¹ As he sees it, concepts of justice must be sought which represent "a higher reality existing outside of ourselves."

It is necessary, Geny believes, to find the source of the law in natural law, which has developed from ancient times and has persisted in spite of all opposition and criticisms.² He thinks it is not, as is often suggested, a means of supplying omissions in positive legal rules but the very foundation upon which positive rules rise and develop.

Speaking of the necessity of natural law, Geny says:

The problem of the existence of natural law remains today as always, the center of gravity of the positive juridical system. And, whether one acknowledges it or not, one perceives it underlying all the efforts which are pursued, in order to realize in an effective manner a better and more complete justice among men. On what bases would the state be established, which preserves in all its powers the positive rules of the social order, and from whence are the powers derived which form it, whether from a simple fact or from a group of principles. Those who make the law, the legislators, are they free to create this law to their liking, following their ideas, their interests, their passions or rather ought they to conform to a superior norm dominating all subjective impressions? Those who engage in the work of positive law, as administrators, those who interpret or apply it, in the capacity of judges, are they bound by this form, by the text of the law; ought they not to look beyond this, to penetrate to the sources, intimate and substantial, from whence they are derived, and those who obey the law, who ought to observe its precepts, to avoid its penalties, are these obligated to submit without recourse to its injunctions? Can they not understand, discuss, criticise the established rules, I mean not only as electors but as subjects; and do they not have the right to interpret, to modify, to transform the existing law, indeed, in extreme cases to

¹ Geny, *op. cit.*, IV, 137 ff.

² *Ibid.*, II, 312 ff.

rebel against it; this implies that they appeal to aspirations defying by their nature the variations of particular legal formulas? And, in the international domain also, where would the necessary rules be found to establish the relations between states, if there is no place for the reality of precepts, outside of the above positive rules, which are here always small and precarious.¹

On the whole, Geny has presented a thorough and suggestive analysis of natural law, with a leaning toward the religious and metaphysical points of view.² He differs from Cathrein, however, in that he presents and criticizes the views of other natural law philosophers and attempts throughout to make practical applications of his theories.

The metaphysical types of natural law of Del Vecchio and of Geny, though differing in certain respects from the realistic approach to higher law by Duguit, have some characteristics in common with the rule of law (*règle de droit*). The higher laws to which all human civil enactments must conform are traced to different sources, the methods of their discovery vary, but substantially the same results follow. Legal norms which may be discovered by the reason or by the intuition of men stand above and guide the entire process of law-making and law enforcement. It is the duty of legislators, judges, and administrators to seek these norms and conform their interpretations to their superior directive force.³

¹ *Ibid.*, IV, 213, 214. Saleilles remarks on Geny's concepts of natural law that he does not maintain that for a given institution there is a body of rules which possesses at least rational existence and which can be formulated into absolute truths; he does not maintain that on a given point any solution can appear in its concrete expression as a formula of natural law; he only contends that in the formulation of a judicial or legal rule judges and legislators have the right and the duty to be guided by ideas of justice, principles of reason, and axioms of equity, the philosophical forms of which would be the expression of immutable and intangible truths for all civilized peoples. "École historique et droit naturel," *Revue trimestrielle de droit civil*, I (1902), 87 ff.

² Reviewing Geny's last volume of the *Science et technique en droit privé positif*, E. H. Perreau calls this the work of a true Benedictine. "Le conflit du droit naturel et de la loi positive," *Revue Générale du droit*, XLIX (1925), 27.

³ Malberg consigns these so-called rules of natural or divine law to the moral or political realm and concludes that "it is a capital error of the jurists that they persist in supporting the doctrine of 'natural law,' an error from which it would be

4. *Natural Law Theories and International Law.* A significant phase of the revival of natural law in Europe is apparent in the efforts to find an enduring basis for international law. Realizing the insecurity of international rules and agreements based solely on treaties, conventions, or a general consensus among the rulers of existing states there is a tendency to recur to general and universal principles of justice as discovered and interpreted through reason according to the methods of Gentilis, Grotius, and Pufendorf. Scholars and jurists are again raising the question whether in the international field, at least, there does not exist a natural or objective law, independent of the will of any state or group of states, and whether the action of states in this field is not limited to ascertaining and giving sanction to this natural law. This phase of the revival of natural law theories has so many ramifications that it is quite impossible to deal with it adequately in this treatise. Some representative opinions may be cited to indicate one of the noteworthy trends in the efforts to establish international law on a more secure foundation.

The trend of thought today regarding the relation of natural law theories to the growth of international law is indicated in a symposium of views by well-known authorities on public law. The following questionnaire was submitted to a representative group of teachers and jurists:

Is the theory of natural law in relation to the law of nations, *jus naturae et gentium*, as advanced by Grotius, and developed in the course of the seventeenth and eighteenth centuries, in force today? — That is to say, ought international and national courts as well as courts of arbitration to follow the principles of this theory, to interpret and to complete positive international law, in order to establish an accord of views among states?

desirable to free the science of law for a long time." To Malberg a rule of law in the true sense can proceed only from the state, which by its superior force can give it a sanction. *Contribution à la théorie générale de l'état*, I (Paris, 1920), 237.

In case of an affirmative reply to the question proposed above, is it the law of morality which forms the basis of the practical application of said theory or is it the objective solidarity of the interests of each of the states carefully considered? Or what other formula would be preferred?

The answers to the queries show a wide diversity of opinions. Most of the replies, referring chiefly to the first query, may be classified under a few groups.¹ One group would discard natural law theories entirely because they "tend to confuse thought and to encourage loose and vague conceptions."² Principles of natural law, according to this view, are valid only when accepted by the nations as a part of the customary international law.³ Another group regard natural law useful to assist justices and arbitrators, when interpreting existing rules of law and when there are deficiencies and uncertainties in the rules of international law applicable to controversies. Some in this group would prefer the use of the phrase "principles of equity" or "principles of morals and justice" to the term "natural law."⁴

Others favor the use of natural law not only to interpret but also to supplement positive international law.⁵ Among

¹ "Jus naturae et gentium; Eine Umfrage zum Gedächtnis des Hugo Grotius" in *Niemeyers Zeitschrift für Internationales Recht*, XXXIV (1925), 113-189.

² Comments of Philip Marshall Brown, *ibid.*, pp. 116-118.

³ See *Niemeyers Zeitschrift für Internationales Recht*, XXXIV, opinions of Fritz Fleiner, University of Zurich, pp. 121, 122; Friedrich Giese, University of Frankfurt, p. 141; Eduard His, University of Zurich, pp. 142-144; Sir T. Erskine Holland, Oxford University, pp. 144, 145; Christian Meurer, University of Würzburg, p. 160; Karl Neumeyer, University of München, p. 161; Karl Strupp, University of Frankfurt, pp. 173, 174; Heinrich Triepel, University of Berlin, p. 187, 188.

⁴ To this group belong Charles Dupuis, Institute of International Law, Paris, *ibid.*, pp. 120, 121; Walter Burckhardt, University of Berne, pp. 118, 119; Alexander Pearce Higgins, Cambridge University, p. 142; George Kleinfeller, University of Kiel, p. 150. Recognizing that the prevailing view among English authorities on international law is that of the Positivist School, Professor Higgins says "appeals are, however, made to the underlying principles of the Law of Nature under the name of Reason or Justice when a test is sought for existing rules, or as a means of suggesting new rules to fill the gaps in the law which modern conditions disclose." *Ibid.*, p. 142.

⁵ Rudolf Laun, University of Hamburg, *ibid.*, 150-152; T. de Louter, University of Utrecht, 152; Joseph Mausbach, University of Münster, 152-160; Otto

this group Gustav Radbruch, German Minister of Justice, thinks international justices should have authority similar to the Swiss judges to fill gaps when written rules are inapplicable, and when necessary to use natural law as a guide. In fact, this authority is regarded as more necessary in international affairs because of the grave dangers arising from legal uncertainties and from unsatisfactory decisions. "The fact is of the greatest importance that even today natural law is not dead, is not a repudiated idea," he asserts,

but a reality which is active in a powerful way. Ernst Troeltsch has shown in a way that cannot be forgotten how the ideas of natural law and of humanity are powerful influences in the Western-European and American, as well as in the Catholic world of thought, and that a new approach for the German historical-organical-positive school to the natural law theory is desirable and inevitable.

If in international legal agreements, reference is made to the "highest fundamental principles of international politics," or to the "international moral law," or to the "fundamental principles of justice and humanity which cannot be renounced" as to something that is evident, what is really meant is the legal principles comprised in natural law. Not as a necessity of reason but as a forceful fact of history, a form of appearance of "approved teachings and traditions," these natural legal methods of thinking have to serve as a guiding star for the further development of international law just as they were decisive for its formation. But one is not allowed to regard these ideas of natural law as an arsenal from which the legal thoughts of international law can be taken as a finished product, but rather as an atmosphere in which such legal thoughts are formed. To make it clearer one may call this atmosphere with another word, "civilization."¹

Eugen Schiffer, German Minister of Justice, also insists that there is a place for natural law in the development of international law:

Opet, University of Kiel, 161, 162; Robert Piloty, University of Würzburg, 163, 164; Nicholas S. Politis, University of Paris, 165; Louis Le Fur, University of Paris, 122-140; Edgard Roubard de Card, University of Toulouse, 168, 169; André Weisz, University of Paris, 189.

¹ *Niemeyers Zeitschrift für Internationales Recht*, XXXIV, 166 ff.; cf. Ernst Troeltsch, *op. cit.*

I have, to be sure, the heretical point of view, that is, that in the classification of the different elements of the administration of justice, the personality of the judge is foremost, the formulation of a method, comes second, and the positive law, last. An able judge almost always manages to get along with a defective method and an insufficient positive law; and, even if he has available a good method, he will mostly obviate the lack or the faults of the law at hand. On the other hand, the best formal law is of no use, if it is paralyzed in its realization by an unfit method, or if it is put into the hands of an unqualified judge. . . . Therefore, I have no doubt about it that a high international court will not be stranded by the lack of actual law which it has to administer, it will rather be its main task and its greatest worth to guide the wavering materials of international agreements and of legal international practices by a *usus fori*, and to bring them from the sphere of occasional actions of a political character to the level of firm and constant legal norms.

Naturally I would not have it understood that the question of actual law is not of farreaching importance for the highest courts. Furthermore I do not overlook the difficulties which are the result of the composition of these courts, with the political, cultural, and social points of view of their members who come from the most different fields of law, for the production of a common positive legal basis. Therefore, the question of the necessity of such a basis is absolutely justified, and, through the nature of international law, the positive parts of which have been badly diminished and shaken by the last world events, the problem of subsidiary law becomes very urgent. To my mind only the fundamental principles of natural law can be taken into consideration for such a law. I, at least, do not know any other law that could fill the gaps of positive international law. But these fundamental principles of natural law I would neither measure with the rule of international solidarity of interest nor with the scale of the recognized subjective interests of the states.¹

Professor Louis Le Fur of the University of Paris answered these questions in the affirmative and his views may well be quoted as indicative of a point of view gaining adherents in Continental Europe.²

¹ *Niemeyers Zeitschrift für Internationales Recht*, XXXIV, 169-171. Duguit finds a real basis for international law in certain international norms exterior to the action of any individual state, which must form the basis for valid joint action in the form of legal rules of conduct. *Traité de droit constitutionnel* (2d ed.) I, 99 ff.

² *Niemeyers Zeitschrift für Internationales Recht*, pp. 122-140. See also, "Le droit naturel ou objectif s'étend-il aux rapports internationaux," reprint from *Revue de*

"The theory of *jus naturae et gentium* of Grotius," Le Fur observes,

is none other than the application to international relations of the traditional theory which is very old, since it goes back far beyond Christianity, and which distinguishes between the law laid down by men, the positive law, and a law anterior and superior to the will of man. In the century in which Grotius wrote, there was at times hesitation to apply to the sovereign state the principles of law, whether for reasons of pure abstract logic drawn from the nature of sovereignty, or for political considerations similar to those which inspired Machiavelli; as soon as the state was involved, which is always the case in international law, it appears that the question of law was no longer considered as it was when individuals were concerned. Now, the state is only a group of men governed by men; it can through its governors deny morality and law and be motivated only by its interests, that is to say, practically speaking, by its strength; but if the state recognizes juridical and moral rules, the bases of these rules cannot be different from the bases of those which apply to individuals. This is the truth of which Grotius caught a glimpse, but very often with less clearness than his predecessors of the Spanish school, such as Vittoria or Suarez; when applied to international law, it appears as the ultimate consequence of this truth established by experience that man is what has been called a "juridical being," a being whose characteristic it is to be ruled by law.¹

Le Fur thinks that man, being gifted with reason and a moral sense or conscience, and having social tendencies, possesses certain juridical characteristics which grow out of

droit international et de législation comparée (1925). Le Fur states that he uses the terms "natural law" (*droit*) and "objective law" interchangeably and that "the second expression has gained general approval today in all countries; but the first one is the traditional expression, and the idea which it expresses rests on a very just basis, if one frees it from the errors which became incorporated in it during the eighteenth century (where, rather than a natural law, one speaks of a law of nature, having in mind a supposed state of primitive nature which would be a state of isolation). Nothing therefore keeps us from reclaiming this expression, once it is freed from the purely adventitious errors which had found their way into it, and this is, in fact, what every one is inclined to do today." *Ibid.*, p. 60.

Portions of this article have been translated and are included herewith by the special permission of Professor Le Fur. See also, by the same author, "Le droit naturel et le droit rationnel ou scientifique: leur rôle dans la formation du droit international," *Revue de droit international* (July, August, and September, 1927); and "La théorie du droit naturel depuis le XVIII^e siècle et la doctrine moderne" (Paris, 1928).

¹ Le Fur, *Revue de droit international et de législation comparée* (1925), pp. 61, 62.

his life as a social being and from his own nature. When these rules acquire a sanction to compel obedience to them they become laws. Those are in error, he says, who confuse the state and the law and who consider the former a necessary condition of the latter. The state, he claims, cannot make law arbitrarily. The nature of human beings must be taken into account and their characteristics as beings gifted with reason and with a moral sense.¹ This, in his judgment,

is the profound truth which has been expressed, under diverse names, by the wisdom of all the ages; if one has been able to speak of a *philosophia perennis*, there is in regard to essential principles a *jus perenne* which controls legal phenomena with more clearness. These diverse names signify none else than natural, or rational, or objective law, all these terms expressing the same truth, which is that law, the rule of life in society, the only life possible for man, is not an arbitrary creation of man. No being formulates for himself the laws which govern his life. Whatever the form of government of a people, be it monarchical or democratic, those who govern can do no more than recognize the law, deduce it from facts interpreted by the reason, and harmonize it with the circumstances of time and environment. For, although immutable in its fundamental nature — which is no other than a moral principle, the idea of justice, itself the soul of law — the law is very variable, on the contrary, in its application since, according to the degree of civilization, the circumstances of life in society are apt to vary quite considerably, from a three-fold point of view, that is an economic, an intellectual, and a moral point of view, and these three are far from always keeping abreast.²

Conceiving natural law in the rôle of an ideal law, which is regarded as the traditional use of the term, Le Fur finds that there is no question about its place in a legal system. "To deny that there can be no other law than the positive law under pretext, for example, that there can be no law without a sanction, and that the positive law is the only law which has a sanction,— is," he maintains, "to assert that the posi-

¹ Le Fur, *Revue de droit international et de législation comparée* (1925), p. 62.

² *Ibid.*, p. 64.

tive law is necessarily what it ought to be, and is to withdraw in this respect all law from criticism.”¹ He continues:

From what precedes it follows that all juridical relations must be conceived in two ways, or, if preferred, that there exist two kinds of law: a rational or natural law, with a moral basis, which is in itself an abstract truth as are all natural laws, existing objectively, as the latter, but unsuspected by men as long as it was not deduced by the effort of the human mind — and a positive law by which those who govern attempt to make it effective, both having as an end the common good of the group to be governed, be it a patriarchal family, a tribe, a city, or a state.²

In his opinion, just as there are limits which a state must recognize in its relations with individuals, so there are limits which bind states in their international dealings. Hence

one is under the necessity either to deny international law, to admit that the nations live in a pre-juridical state, without objective or conventional rules which bind them, war, the expression of the right of the strongest, being the only solution in conflicts — or to recognize the existence of a natural or objective international law, which is not a pure form covering any sort of content, but rather a just and useful law, corresponding to the common good, and the common good is here that of the entire international community. Exactly as in the case of internal law, it is not arbitrary human wills, but really an historical, economical, and moral complex, which conditions international law.³

Just as in the case of private law, arbitral courts and international tribunals must be guided, he thinks, not only by the interests of the states involved but also by principles of justice and of natural equity which are the background of all positive enactments. And, just as a national judge is authorized to make a rule where the written law is defective, international judges, when a pre-existing rule is lacking, must to a limited extent perform the functions of an international legislature.⁴

¹ Le Fur, *Revue de droit international et de législation comparée* (1925), p. 66.

² *Ibid.*, p. 67.

³ *Ibid.*, p. 68.

⁴ *Ibid.*, pp. 78, 79. An attempt has been made in France as well as in other countries, to base international law on the individualistic doctrine of the origin of law. It is called the theory of the fundamental rights of states. Just as an individual

The natural law to be applied by these judges is not of an immutable kind according to the eighteenth-century model nor of a variable type such as Stammler describes but a form of the concept with both permanent and variable characteristics.¹

"With regard to international law," says Sir Frederick Pollock, "it is notorious that all authorities down to the end of the eighteenth century, and almost all outside of England to this day, have treated it as a body of doctrine derived from and justified by the Law of Nature."² "Here as elsewhere," he suggests, "we must apply the principle of Aristotle, and deem that to be reasonable, which appears so to competent persons. There must be a competent and prevalent consent, and the best evidence of such consent is constant and deliberative usage."³ There are those in England as elsewhere who vision a Magna Carta for the field of international relations which shall set the world on the path of legality rather than that of force to settle disputes between nations and which shall limit the scope of the arbitrary powers of sovereigns.⁴

Though little progress has been made in formulating the rules and principles of natural law applicable to international

is regarded as having certain inherent rights, so states, it is asserted, have fundamental natural rights which must be respected by all other states. There exist, it is claimed, among the states fundamental, primitive, and absolute rights, rights which belong to every state in its relations with other states. Among some of the rights mentioned are independence, equality, respect, and international commerce. A. Pillet, "Recherches sur les droits fondamentaux des états," *Revue générale de droit international public*, V (1898), 66, 236; VI (1899), 503. For an American version of such fundamental rights, consult James Brown Scott, "The American Institute of International Law: Its Declaration of the Rights and Duties of Nations" (1916), and comments by Elihu Root in *American Journal of International Law*, X (1916), 211.

¹ Cf. "Le droit naturel, le droit rationnel ou scientifique," *op. cit.*, p. 37.

² *Essays in the Law*, p. 63.

³ *Ibid.*, pp. 63, 64. Cf. opinion of the English law officers (including Lord Mansfield) in the case of the Silesian Loan, that the law of nations is founded upon justice, equity, convenience, and the reason of the thing and confirmed by long usage." Holliday's *Life of William Earl of Mansfield* (London, 1797), p. 428.

⁴ W. S. McKechnie, "Magna Carta (1215-1915)," Malden, *Magna Carta Commemoration Essays*, pp. 22, 23.

relations it is a common belief that in the drafting and the interpretation of an international code modernized versions of the law of nature or law of reason will have a directive influence.¹

5. *Theories of Natural Law Prevalent in Europe.* In the extensive use which was made of the natural law philosophy in Continental European legal thinking since the eighteenth century there are apparent a variety of types of superior law theories. The inheritance of the Middle Ages furnished a form of higher law concept in the nature of law fundamental which was designed to keep rulers within recognized legal channels. Not only was there a foundation for a resistance to arbitrary rule which gave sanction to the leaders of rebellion and revolution but there was in this concept an ever-present criterion for judges and administrators to hold in check overzealous officials. Such a higher law philosophy was supported by the continuance of the eighteenth-century theories of natural rights which result from notions either of the laws of God or of qualities inherent in the individual. The nineteenth-century concept of civil liberty — a realm within which the individual is secure from political interference — which emerges into a doctrine of limited government under constitutional sanctions, owes much to this form of the natural law philosophy.

The theologians and those influenced by the philosophy of the church, conceived natural law after the model of Thomas Aquinas, as an emanation from God. Its principles, which were eternal and universal, might be discovered through reason and revelation. Religion, morality, and politics were therefore only different phases of the same basic ideas. Civil enactments which failed to conform with the religious and moral standards revealed by the Church were denied validity.

¹ Lord Russell remarks on the employment of the natural law method in modern international law, "International Law and Arbitration," *American Bar Association Reports*, XIX, 253, 268.

Some jurists who no longer emphasized the religious background found for natural law *a priori* and metaphysical bases. They conceived a logical form or juridical norm to which all valid civil enactments must conform. Such a norm was in its essence universal — an ideal becoming objective and directive as it conditioned all the processes of law-making and law enforcement. Not discoverable in any existing legal rules, it was inherent as a formal principle in all such rules which were just and valid.

As speculation on legal matters was fostered by the universities and courses in the philosophy of law were offered, natural law and the philosophy of law were thought of as identical. Thus natural law became synonymous with a series of ideal moral and legal principles which might be commented upon extensively. The philosophical mold into which natural law thinking was cast in the early nineteenth century gave it a wide currency in intellectual circles and brought it increasingly into contempt among politicians and practical lawyers. Certain treatises appearing at this time not only aimed to combine natural law and the philosophy of law but also to explain both of these in the light of religious and moral principles. Political practices and legal rules were put to the test of standards derived from this curious compound of speculations. No wonder that the very name of "natural law" became anathema among those who were seeking a scientific basis for social phenomena.

At all times natural law has been considered as a body of principles or doctrines, sufficiently well known and approved to be used by judges in molding the law to suit concrete cases or in filling gaps in the written rules as applicable to controversies. And at the same time it has been regarded as a body of doctrines or ideas available for jurists and legal writers as a standard for the criticism of existing laws and decisions, in the development of what Continental jurists call the juris-

prudence and the doctrines of the law. In such a rôle natural law comprises a series of subjective and objective standards which may be used to determine the justice or reasonableness of legal rules. To some, these standards are universal and immutable. Sociological jurists, on the other hand, find in the natural law with a variable content standards adapted to the times and conditions which measure the reasonableness or justice of the rules enforced in a given society.

The political thought of the Middle Ages was affected by the ideas of government based on popular consent, of natural rights belonging to the individual, and of theories of contract as a basis of civil society. From such ideas arose a belief in higher laws which result from the common feelings and sentiments of the people. Concepts of law and of rights were traced to this popular source. The Historical School of jurists, though repudiating earlier doctrines of natural law, merely paved the way for another type of higher law doctrine — one arising from the settled customs and traditions of the people.

The adherents of natural law fall into three main groups. First, those who place superior laws of a fixed, immutable character, usually religious or ethical in origin, over and above all the acts and rules of mankind. Following the Absolutists in their approach to philosophical problems they look upon lawmakers and judges as seekers "among divine sources for pre-existing truth."¹ The inexorable rules of natural law may be discovered or not, but failure to abide by them will, in the course of time, result disastrously. Some of the theories of natural rights also predicated an immutable order with eternal laws, but rights and laws were among the inherent qualities of man in such an order. These rights, too, were to be discovered and applied but not changed. It is interesting to see how the absolutist concepts of natural law and natural

¹ James C. Carter, *Province of the Written and Unwritten Law*, p. 9.

rights keep recurring in legal thought whether founded on religious sanctions or on the inherent qualities of man.

The second group of thinkers undertake to find the underlying principles of law in the customs and the social life of man, or in the interests and duties of man as a human being. Recently theorists with this approach have sought the fundamental legal rules in community sentiment, the feeling for right (*Rechtsgefühl*), or in the concept of social solidarity. With a slight turn in emphasis this method of finding natural law leads to a "natural law with a variable content." Viewing higher law notions in a broad sense this group comprises some of the foremost analysts of legal phenomena on the Continent of Europe.¹

Natural law as an idealistic, progressive, and critical concept is what the third group is expounding. Interested in the philosophy of the law, they seek "the rational element which enters into the complex product of the legislation of every nation. . . . In practice, it is still often called by the name 'natural law,' which is opposed to the term 'positive law.' . . . It is the ideal of the positive law, the type which the lawmaker ought to realize, and almost always pretends to realize." ² When, as with Stammler, the philosophy of law becomes the theory of propositions about law which have universal validity, one is in the field of natural law ideas.³

¹ "The Latin group and the German group (which we shall combine here for brevity under the name of 'continental') admit the existence of law beyond the sphere of positive law; that is to say, they accept the existence of jural relations, although these relations may not have been validated by the legislator. Formerly these factual relations were evolved out of human nature (natural law); today they are predicated on conscience and public opinion which furnish the elements necessary for their support." Alejandro Alvarez, "New Conception and New Bases of Legal Philosophy," *Wigmore Celebration Legal Essays* (Chicago, 1919), pp. 29, 30.

² Boistel, *op. cit.*, secs. 1, 2. "The natural-law school seeks an absolute, ideal law, natural law . . . by the side of which positive law has only secondary importance. The modern philosophy of law recognizes that there is only one law, the positive law, but it seeks its ideal side and its enduring idea." Berolzheimer, *System der Rechts- und Wirtschaftsphilosophie*, II, 17.

³ Cf. *Zeitschrift für Rechtsphilosophie*, I, 4.

In European political thought it is the ideal, progressive, and critical function of natural law which is uppermost. Whatever its sources or sanctions may be the chief proponents of higher law ideas are not engaged in a search for final legal rules to which all mankind must yield obedience. They are directing their efforts to the discovery of fundamental principles, of directing norms, or of established standards by which the reasonableness or justice of legal rules may be measured. The absolutist, dogmatic concepts of natural law have been largely replaced by those characterized as "idealistic criticism."

It is, therefore, in the realm of jurisprudence and in the development of legal doctrines that natural law thinking prevails in European legal thought. Its functions are to guide, to criticize, and to measure the law as made by legislators and applied by judges so as to keep it in reasonable and just channels. The natural law concepts, then, whether used by judges or commentators are, to a large extent, as they were with the Roman jurists, creative forces in an epoch of progressive law-making.

PART V

SIGNIFICANCE OF THE REVIVAL OF HIGHER LAW
CONCEPTS IN THE PUBLIC LAW OF EUROPE
AND OF AMERICA

CHAPTER XII

OBJECTIVES IN THE MODERN REVIVAL OF NATURAL LAW THINKING

THOUGH no effort has been made to review any but a few of the many indications of the revival of natural law theories or of other types of higher law notions, sufficient evidence has been given to show that the return to these concepts, as criteria to measure the justice or validity of civil enactments, is more than a casual phase of current legal thought. Many factors are combining to bring to the fore again some of the ideas involved in the ancient doctrines of natural law. With widely differing purposes in view and with varying approaches to the fundamental and permanent principles of the law, legal philosophers, jurists, and judges, in applying concrete formulae of written charters, codes, or statutes, are wont to turn to modernized versions of the law of nature or of its counterpart, the law of reason.¹ It is obvious of course that there are many thinkers in all countries who deny that there is such a thing as natural law with anything more than moral import, and who doubt the possibility of any such thing as a true philosophy of law. This point of view is so well known and is so general in legal thought that it seems unnecessary to elaborate on it in a treatise the object of which is primarily to indicate the significance of opposite opinions.

Among some of the prevailing tendencies in legal thinking which are giving an impetus to the revival of higher law theories are: first, the efforts to introduce in a more direct way

¹ "It is not an accident that something very like a resurrection of natural law is going on the world over." Roscoe Pound, in *Harvard Law Review*, XXV (December, 1911), 162; also Sir Paul Vinogradoff, *Common Sense in Law*, p. 246.

ethical concepts into the law; second, the attempts to formulate ideal or philosophical standards to measure positive laws; third, the establishment of criteria for judges and administrators when they act as legislators; fourth, a justification for limits on the sovereignty of states. Each of these modern applications of natural law concepts deserves brief consideration.

1. *Natural Law as a Device to introduce Ethical Concepts into the Law.* It is apparent that natural law thinking has served many purposes in the process of the evolution of legal systems. None of these purposes has been more constant and influential than the effort to infuse ethical concepts into the practical application of the law by means of natural law principles. Every stage in legal evolution bears witness to the close relation between law and morals and not infrequently the law of nature served as a convenient connecting link. A reference to the stages of legal history previously outlined will indicate some of the obvious relations between these concepts.

In primitive legal systems law and religion were inseparably combined. As law and religion came to be distinguished, law remained organically associated with morals and ethics. It was customary for the Greeks and the Romans to identify jurisprudence with inquiries as to the right and the just by nature and there was no disposition to separate law and morals. The identification of the legal with the moral prevailing at this time and the combination of both in the natural law concepts gave a turn to legal speculation which has influenced the growth of the law in many of its subsequent stages.¹

During the Middle Ages law was merely a branch of theology and was necessarily associated with moral and ethical

¹ Roscoe Pound, *Law and Morals* (2d ed. Chapel Hill, 1926), Lecture I, "The Historical View." Dean Pound has dealt so fully with the relations of law and morals in this series of lectures that only a summary of certain phases of this relation need be considered.

thinking. With the Reformation came one of the first efforts to separate jurisprudence and theology, but even then law was considered as intimately connected with moral ideas. And this connection continued until the beginning of the nineteenth century. Kant broke away from the ideas of natural law prevalent in the eighteenth century, but he conceived of natural law in the form of eternal and immutable principles as standards to guide the processes of law making and law-enforcement.¹ The cycle through which man has passed in working out the relations of law and ethics is characterized by Dean Pound as the "ethical-philosophical natural law" of the Romans, the "authoritative-theological natural law" of the Middle Ages, the "rational-ethical natural law" of the seventeenth and eighteenth centuries, the "metaphysical natural law" of Kant, to the repudiation of all theories of natural law by the Analytical School. Thus, he observes,

the cycle is complete. We are back to the state as the unchallengeable authority behind legal precepts. The state takes the place of Jehovah handing the tablets of the law to Moses, or Manu dictating the sacred law, or the Sun-god handing the code to Hammurabi. Law is law by convention and enactment — the proposition, plausibly maintained by sophists, which led Greek philosophers to seek some basis that made a stronger appeal to men to uphold the legal order and the security of social institutions.²

The historical school of jurists and the exponents of the positivist theories of jurisprudence sought a complete separation of law and morals. The ethical and moral ideas of earlier times which were translated into effective legal norms were to be replaced either by customs and principles of action which emanated from the sentiments of the people of a given time and locality,³ or rules of action formulated by a po-

¹ Cf. Kant, *Metaphysische Anfangsgründe der Rechtslehre* (1797).

² Pound, *op. cit.*, pp. 12-14.

³ Pound claims that the historical jurist merely indicated a new basis for natural law in insisting on universal ideal principles to which positive law must conform. *Op. cit.*, p. 21.

litical sovereign which became intrinsically just by the acceptance and promulgation of the state.¹ Analytical jurisprudence, especially as defined in England and in America, carried to the extreme the attempt to separate ethics and law. Exponents of this school believed that the great gain which jurisprudence made during the last century was the recognition of the truth that the law of the state is not an ideal, but something which actually exists. Law, they maintained, is not that which is in accordance with religion or nature or morality; it is not that which ought to be, but that which is. Justice Holmes expressed the prevailing sentiment among analytical jurists when he favored banishing from the law every word of moral significance and suggested that in so doing "we should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought."²

As a matter of fact the point of view of the analytical jurists did not result in banishing the ethical and moral elements in the administration of justice but only attempted to conceal the process with "dogmatic fictions."³ Ethical concepts seemingly excluded from the judicial processes were extensively used by English and American judges in molding the ancient rules and principles of the common law to meet new conditions and in the application of standards in which the moral and ethical elements played a not insignificant part.⁴ Though the followers of John Austin, such as J. G. Holland, still insist that in England law and morals must be distinctly separated, the following statement will suffice to show the contrast between the profession and the practice in

¹ John C. Gray, *The Nature and Sources of the Law* (2d ed.), p. 94.

² *Collected Legal Papers* (New York, 1920), p. 179.

³ Pound, *op. cit.*, pp. 56, 57.

⁴ See illustrations of the close relations of law and morals in Pound, *op. cit.*, Lecture II, "The Analytical View."

emphasizing the judge's function in translating into law the customary ideas of ethical conduct:

It is the peculiar characteristic of the English system, and of systems derived from it, that the judges, though historically and technically the servants of the state, and bound to enforce its commands, have almost from the first also played the important part of educating the community in the ethics of social conduct. And in that part they have drawn their inspiration, not from abstract and possibly, unpractical ideals, but, by an almost imperceptible process of abstraction and development, from the solutions arrived at by the better members of the community of the many problems of practical life. This is, I think, the inward meaning of their frequent appeals to the example of the "reasonable man," that favorite objective standard of the English judge. With unwearying patience, ingenuity, and unsparing labor, our judges have, if I may so put it, woven into the national, that is, the political life of the community that instinct of justice, that respect for ethical considerations, which, if it be not presumptuous for an Englishman to say so, is one of the most conspicuous as well as one of the most honorable and abiding features of the English character.¹

The disposition to consider the close relationships of law and ethics even in countries where the analytical or positivist theory has prevailed is indicated in the opinion of a great English justice. After defining law in the ordinary sense as rules of conduct laid down by the sovereign will of the state and enforced by the sanction of compulsion, Lord Haldane observes:

Law, however, imports something more than this. As I have already remarked its full significance cannot be understood apart from the history and spirit of the nation whose law it is. Moreover, it has a real relation to the obligations even of conscience, as well as to something else which I shall presently refer to as the general will of society. In short, if its full significance is to be appreciated, larger conceptions than those of the mere lawyer are essential; conceptions which come to us from the moralist and the sociologist, and without which we cannot see fully how the genesis of law has come about. That is where

¹ Edward Jenks, "The Function of Law in Society," *Society of Comparative Legislation and International Law*, 3d ser., vol. V, Pt. IV (1923), pp. 176, 177.

writers like Bentham and Austin are deficient. One cannot read a great book like the "Esprit des Lois" without seeing that Montesquieu had a deeper insight than Bentham or Austin, and that he had already grasped a truth which, in Great Britain at all events, was to be forgotten for a time.¹

He then refers to rules of conduct which, so far as the citizen is concerned, are regulated only to a small extent by law and legality on the one hand, and by the dictates of individual conscience on the other (a field which corresponds to the German *Sittlichkeit*) the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which it is "bad form" or "not the thing" to disregard. In this field the guide to which the citizen mostly looks is the standard recognized by the community, an illustration of "a sanction which is sufficient to compel observance of a rule without any question of the application of force. This kind of sanction may be of a highly compelling quality." Attention is then directed to the gradual evolution of an international *Sittlichkeit* which promises a sanction for international obligations not yet fully recognized by formal laws and treaties.² Many others who approach the law from the analytical or positivist point of view agree with Judge Dillon that "ethical considerations can no more be excluded from the administration of justice than any one can exclude the vital air from his room and live."

The Philosophical Schools of jurists, on the other hand, have always emphasized the close relations between law and morals, and hence have found as a rule a place for natural law theories. Legal philosophy on the Continent is often closely related to metaphysical and theological thinking wherein law, morals, and religion are inseparably associated. Even when legal philosophers have succeeded in divorcing law from

¹ Lord Haldane, "Higher Nationality: A Study in Law and Ethics," American Bar Association *Reports*, XXXVIII (1913), 402, 403.

² Lord Haldane, *op. cit.*, pp. 403-405, 413. *Sitte* generally refers to custom — *Sittlichkeit* implies custom and a habit of mind and action.

its former metaphysical and theological bearings they have conceived of an ethical basis for all law.¹ Thus Stammler and Kohler, as well as Duguit, Krabbe, and Del Vecchio, subsume an ethical basis for the rules of right or principles of justice to which all true law must conform.

The different schools of jurists, it is claimed, were looking at distinct elements of what is called law. The analytical jurist turned his attention almost exclusively to the fixed body of rules applied by the official organs of the state. The historical jurist placed uppermost the mass of traditional ideas and customs from which actual legal rules are derived. The philosophical jurist emphasized a third element, the social and ethical ideas which are involved in legal rules and by means of which the law is being constantly remolded. "The philosophical jurist," says Dean Pound,

has called this third element "natural law" and has given us a theory of all law on the basis thereof. The historical jurist has called the second element "custom" and has given us a theory of all law on that basis. The analytical jurist has sought to treat the second and third elements as but sources from which legal precepts are made, but which themselves are no part of the law, and so has given us a theory of law exclusively in terms of the first element.²

The historical jurists, with their emphasis upon the customs and conventions of the people and upon the process of finding the law through a search among such customs and conventions, were superseded by the school of analytical jurisprudence which directed its attention primarily to statutes and to the interpretation of law by the courts. Coincident with the rise of the Analytical School came the era of prolific law-making when most legal thinking was turned into the channels of the verification of facts, of experimental methods of

¹ Pound, *op. cit.*, p. 103. Coleman Phillipson suggests that "natural law, in spite of its being frequently maligned and scoffed at, will continue to hold the minds of men as long as men remain psychologists and moralists." *Great Jurists of the World*, p. 306.

² *Op. cit.*, pp. 23-25.

trial and error, and of an examination for legal purposes of a minutiae of data. Thus with the triumph of the latter school emphasis was directed from rules, principles, and universal formulae to a congeries of facts and conditions to which law was to be made to conform. The search for principles was tabooed as was also, in certain quarters, the study of comparative law. What was thought to be necessary was to discover from the mass of data available what legal corrective was desired and then to have the sovereign make a rule accordingly which *ipso facto* became the law for the time being until changed by the same sovereign. That the analytical jurists over-emphasized the passing and conventional and failed to take due account of certain other vital factors in evaluating the legal process became more apparent as this point of view was formulated into a recognized system of jurisprudence. The extreme theories of this school have augmented the reaction which is leading jurists again to turn their attention to principles and to rules which are of more than passing moment,¹ and to the necessity of establishing closer relations between ethics and law.

2. *Natural Law as an Ideal or Philosophical Standard.* Beginning at least with the Greeks and the Romans natural law was thought of as an ideal or philosophical standard toward which temporary enactments or ordinary civil laws were to approximate. Similar use was made of the concept during the Middle Ages. And it is an ideal standard to which appeal may be made when other sources failed to give justice that judges and jurists frequently referred to natural law, natural justice, and natural rights. There are times, as in the seventeenth and eighteenth centuries, when natural law as an ideal

¹ Evidences of the new point of view are at hand even in countries where the Analytical School has been strongest, such as the movement in the United States directed by the American Law Institute to extract principles of law from the welter of statutes and decisions and the efforts now participated in by all of the leading countries to secure a codification of international law.

was subordinated to certain fixed and immutable conceptions of law and right, but these were only temporary deviations from the main purpose of natural law ideas. For centuries law was liberalized chiefly "by a juristic doctrine that all legal institutions and all legal rules were to be measured by reason and that nothing could stand in law that could not maintain itself in reason."¹ The use of natural law as a standard to guide law in its progressive development is again receiving serious consideration. Law must take its bearings from the ethical standards of justice. This gives rise to certain requirements, as, for example, equality before the law, which involves the idea of fair play. Speaking of the attempts to put in opposition to positive law, the law of nature in the seventeenth and eighteenth centuries, Sir Paul Vinogradoff suggests that "unless I am much mistaken we witness another wave of this kind in our own time."² During ancient and mediaeval times, he observes, two purposes of natural law were gradually evolved, one in which it served a theoretic foundation for axiomatic truths from which a rational system of positive law could be derived. According to this purpose existing legal rules were accepted as manifestations of permanent legal principles. On the other hand, the concept was used as a critical standard to distinguish between reasonable and unreasonable rules. It was used by Rousseau and Kant to serve as a philosophical basis for revolutionary ideas. Modern exponents of the law of nature, such as Charmont, Saleilles, and Stammler recur to natural law as a critical standard. The new natural law is regarded as a pervasive method by the help of which rules of law are to be criticized and estimated. Thus the evolution of natural law has been

¹ Pound, *The Spirit of the Common Law*, p. 81.

² Sir Paul Vinogradoff, "Legal Standards and Ideals," *Michigan Law Review*, XXXIII (November, 1924), 1 ff. For reference by the same writer to the revival of a modified conception of the law of nature as one of the significant currents of thought in jurisprudence, see *Historical Jurisprudence*, I, 144, 145.

influenced by the tendency toward the scientific treatment of social life in distinction from the rationalistic individualism of the eighteenth century. The problem today is regarded as one of ascertaining certain standards of social value, and in this process the new natural law takes a prominent place, not as a fixed and immutable standard as of the eighteenth century, but as a standard which changes to suit the conditions of various races and divergent times and conditions.

There is a better appreciation today of the fact that in certain divisions of the law there are few rules and that judicial decisions are based chiefly on standards and degrees.¹ The application of such phrases as those of "fair conduct" in the case of a fiduciary, "due care" in the law of negligence, "good faith" and "fair competition" in business transactions, "reasonable facilities" in furnishing public utility services, "fair return" on property invested in a business, and, "due process of law" in depriving an individual of life, liberty, and property are well-known illustrations of the method of determining rights on the basis of standards rather than rules. In cases involving such concepts the judge must form his own standard and measure the degree of agreement or variation of conduct with the standard. "He must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and all the rest, and, adding a little here and taking out a little there, must determine, as wisely as he can, which weight shall tip the scales."² Some of these standards found their way into the law through the frank recognition of natural law theories.³ And there are abundant indications that natural law methods of thinking are conditioning their application in various branches of modern law.

¹ Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1922), pp. 161, 162.

² Cardozo, *op. cit.*, p. 162.

³ See Pound, *Law and Morals*, p. 60.

Instead of seeking a law of absolute significance, modern jurists find in natural law an ideal with changing content which furnishes a standard to test what is theoretically and practically just under certain given conditions.¹ This natural law is regarded as "an idealized ethical custom and an ideal picture of the end of law, painted, it may be, with reference to the institutions and ethical customs of the time and place, which may serve as an instrument of shaping and developing legal materials and of drawing in and fashioning materials from outside of law."²

We are witnessing, then, the rehabilitation of natural law theories, not as a formal part of positive law, but as conceptions wielding influence on the opinions of judges and legislators.³

Some modern commentators on French law admit that from the standpoint of philosophy the jurists have always

¹ Stammler, *Wirtschaft und Recht* (2d ed.), p. 181, and *Lehre von dem Richtigen Recht* (Berlin, 1902), pp. 116-121; Saleilles, "L'École historique et droit naturel," *Revue trimestrielle de droit civil*, I, 80, 98; R. Demogue, *Notions fondamentales du droit privé*, p. 22.

Vinogradoff characterized this phase of natural law thinking as follows: "The law of nature is an appeal from Caesar to a better informed Caesar. It is an appeal by society at large, or by the best spirits of a given society, not against single decisions or rules, but against entire systems of positive law. Legislators are called in to amend law by separate statutes; judges may do a great deal in amending the law by decisions in individual cases, but the wisdom of legislators and equity of judges are by themselves powerless against systems, because they start from the recognition of the authority of positive law in general. And yet law, being a human institution, ages not only in its single rules and doctrines, but in its national and historical setting, and the call for purification and reform may become more and more pressing with every generation. Public opinion, then, turns from reality to ideals. Speculation arises as to the essentials of law as conceived in the light of justice. Of course these conceptions of justice are themselves historical, but they are drawn not from the complicated compromises of positive law but from the simpler and more scientific teaching of philosophical doctrine. Thus the contents of the law of nature vary with the ages, but their aim is constant; it is justice; and though this species of law operates not in positive enactments, but in the minds of men, it is needless to urge that he who obtains command over minds will in the end master their institutions." *Common Sense in Law*, pp. 244, 245. See also, by the same author, "Reason and Conscience in Sixteenth Century Jurisprudence," *Law Quarterly Review*, XXIV (October, 1908), 379.

² Pound, *Law and Morals*, p. 113.

³ Vinogradoff, *Common Sense in Law*, pp. 235 ff., and *Central Law Journal*, LXXX (May, 1915), 346.

distinguished natural law from positive law but they join the critics in denying the practical efficacy of natural law theories. Referring to the contention that natural laws consist of rules which emanate directly from God and form the source and sanction of all civil enactments and quoting French authors who deny the existence of such *a priori* rules, G. Baudry-Lacantinerie and M. Houques-Fouciade observe that

this latter notion of natural law appears to us the only one admissible and it is to this which we would turn if it were absolutely necessary to make a place in juridical science for the idea of such a law. Natural law comprises then all of the rules consecrated or not by positive law, for the observance of which in a given society, it will be desirable that man be restrained by the means of exterior coercion. It will be, then, according to the changes in current opinion, susceptible of variation in the time and place, with the constitution itself of the society envisaged. But the name "rational law," or even theoretic or ideal law, appears to us better than the term "natural," which is affected often by the metaphysical conception associated with it. In other terms this law would be, as we see it, perfect law in opposition to necessarily imperfect law established by positive legislation. This approaches very nearly to the view of M. Huc, who defines natural law as "the law such as it ought to be according to the improvements recognized necessary and possible."¹

Throughout legal history certain periods have been characterized by emphasis upon particular phases of the growth of the law. There were times when law was thought of primarily as an ideal of reason and of truth whether its source was conceived to be divine or human. Law to be real, effective, and in any sense permanent, had to accord, in a measure at least, with these ideas or ideals. At other times law was conceived largely as a growth. Law was thought to be the creation of the national consciousness or of the spirit of the people. Evidences of it were to be found in the customary habits of the people. And at such times it was regarded as the sole duty of the state to discover and enforce these

¹ *Traité théorique et pratique de droit civil*, I (3d ed., 1907), 5.

customary rules. Law has also been considered as the will of a determinate group in any political society — in an ultimate sense the will of a sovereign. From this point of view it was authority or force not truth or justice which made law. There has been an age-long antagonism between the advocates of law as an emanation from authority or force and law as an embodiment of truth and justice. Political thought has varied as one or the other of these conceptions prevailed.

During the past century there has been an increasing tendency to revert to the force theory as a basis for law. But the work of the supposed omnipotent sovereigns has failed to meet with popular approval and has turned public activities too frequently into the direction of discord and strife to receive anything like universal assent. Once more the seers and the prophets are inclined to assert that law is not force, nor is it merely growth from customary habits, but it is right reason, as discovered from the nature of man himself, and that law to be in accord with reason must be found by rational processes based on the experience of man in his social relationships.¹ Thus we are called upon to return to the ancient landmarks — to natural law as an ideal standard as conceived by the Greeks and Romans. The law as idea is again to take a foremost place in the lawmaking processes. But law as force and law as growth from customary conduct may be used as supplementary concepts. "Logic, and history, and custom, and utility, and the accepted standards of right conduct," it is now affirmed, "are the forces which singly or in combination shape the progress of the law."²

Vinogradoff suggests that what is needed in contrast with the analytical jurisprudence of the Austinian type or of the older *Naturrecht* or historical type is a "synthetic jurispru-

¹ Cf. Joseph H. Drake in editorial preface to Del Vecchio, *Formal Bases of Law*, p. 28.

² Cardozo, *op. cit.*, p. 112.

dence" which takes into consideration the various factors which contribute to the making and enforcement of a rule of law.¹ And the Austinian School was not able to discard law as idea or the concepts of natural law. In fact, the Analytical School, though formally repudiating natural law, has been influenced at all times by an anonymous natural law in the form of ethical views as to what is fair and just. Positivists do not in fact deny that moral ideas influence the law; they merely contend that ethical rules of conduct are not law until they receive the approval of the lawmaking or law-enforcing agents of the sovereign. Ethical views are always "streaming into the law through all the human agencies that are connected with it, judges and jurists as well as legislature and public opinion. Indeed the body of the law could not maintain itself if it did not conform in large measure to the prevailing sense of justice."²

When an estimate is made of the elements of a legal system the laws and the decisions of a given period are found to be transitory. Conditions arise which constantly require new rules and regulations. The element which endures in the system is the professional ideals of the legal order — a body of philosophical, political, and ethical ideals as to the purpose of the law.³ To understand a legal system it is more important to discover and evaluate these ideals than minutely to analyze the rules of positive law. For the ideals which are set as the goal not only determine the trend of legal development but also result in the formulation of new legal rules and standards. The antipathy to legislation which is a fundamental principle of the common law,⁴ applied in an environ-

¹ *Custom and Right* (Cambridge, 1925), pp. 12, 13.

² M. R. Cohen, "Jus Naturale Redivivum," *Philosophical Review*, XXV, 761, 762.

³ Pound, "The Theory of Judicial Decision," *Harv. Law Rev.*, XXXVI (April, 1923), 661.

⁴ *Idem*, "Common Law and Legislation," *Harv. Law Rev.*, XXI (April, 1908), 403.

ment where ideals of government limited in behalf of individual liberty, and of a philosophy of economic and political *laissez faire* prevailed, gives a clue to many features of American constitutional law. The doctrine of implied limitations on legislatures and the extension of the meaning of due process of law may be traced to legal attitudes compounded from such ideals and accentuated by their application to pioneer conditions.

3. *Higher Laws to guide Judges as Legislators.* Modern exponents of natural law theories reject the mechanical notion of the place and function of the judge whereby he is expected merely to seek and apply predetermined rules and is not permitted to mold the law in the course of his application of these rules. They believe that whether legal traditions admit it openly or conceal the practice judges necessarily take a prominent part in the lawmaking process as they adapt legal rules to the unusual conditions of concrete cases. They maintain that "the judge who would think and act rightly in his function of rendering judgment must be able, as far as inelastic provisions of the statute do not prevent him, to discover in the law and make effective that which he himself, if placed in the situation of the parties, would feel right and just."¹

In countries where the civil law prevails the question as to the practice of free legal decision arises in connection with the requirement that the judges render a decision as to the rights of the parties when no code provision or statutory rule is applicable. The French Civil Code makes it compulsory that the judge decide the issue under such circumstances² and other

¹ Gmelin, *The Science of Legal Method* (Boston, 1917), p. 89; for a thorough discussion of the function of the judge as a lawmaker, see other selections in this volume. Cf. also my article on "General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges," *Illinois Law Review*, XVII (June, 1922), 96. In the following pages a few extracts are used from this article.

² Art. 4 of the Civil Code provides that "le juge qui refuse de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice."

nations have followed the French practice. Modern codes in Continental Europe make the duty of judges in this regard more specific, as may be seen in the Swiss, Austrian, and Italian systems.¹

Though the instances may be infrequent when the judge lacks guidance from the statute or the code and is called upon in his capacity as judge to act as a legislator, the principle is well established in European countries that when occasion arises he should not shirk the responsibility. It is then that he is to be guided by the customary conduct of reasonable men.² The statute for the Permanent Court of International

¹ The pertinent provisions of these codes are:

The statute governs all matters within the letter or the spirit of any of its mandates. In default of an applicable statute, the judge is to pronounce judgment according to the customary law, and in default of a custom, according to the rules which he would establish if he were to assume the part of a legislator. He is to draw his inspiration, however, from the solutions consecrated by the doctrine of the learned and the jurisprudence of the courts. Swiss Civil Code, art. 1.

Should the case, however, remain doubtful, it shall be decided in accordance with the law of nature and with due regard to the circumstances of the case diligently collected and thoroughly considered. Austrian Civil Code Introduction, secs. 6-8.

When a case, however, remains doubtful, one ought to decide according to the general principles of law, taking into account all of the circumstances of the controversy. Italian Civil Code, 1866, sec. 3.

In discussing the language of the Italian code the question arose whether to use the phrase "following the principles of natural law" or "following general principles of law."

Other phrases suggested were "principles of reason," "principles of equity," "principles of natural equity," "principles of natural reason." The general principles of law were referred to as those rules which reason deduces from the nature of things and from their reciprocal relations. Giorgio Del Vecchio, *Sui principi generali del diritto* (Modena, 1921), pp. 9, 10.

² See Cardozo, *op. cit.*, p. 106.

When positive laws are silent or vague Stephen suggests that judges may decide "according to the natural reason of the thing"; Geny would have them render judgment according to the "nature of positive things"; and Pollock would have them follow the "ideal standard of scientific fitness and harmony."

The will of the state, expressed in decision and judgment, says Gmelin, is to bring about a just determination by means of the subjective sense of justice inherent in the judge, guided by an effective weighing of the interests of the parties in the light of the opinions prevailing among the community regarding transactions like those in question. And Geny recommends that, on the one hand, we are to interrogate reason and conscience, to discover in our inmost nature, the very basis of justice; on the other, we are to address ourselves to social phenomena, to ascertain the laws of their harmony and the principles of order which they exact. *Sociological Method*, trans. Modern Legal Philosophy Series, IX, 131. Geny, *Méthode d'interprétation et sources en droit privé positif*, II, 92.

Justice also authorizes the justices to apply "the general principles of law recognized by civilized nations" along with international conventions, international custom, judicial decisions, and the teachings of publicists.¹

In Anglo-American jurisdictions the conflict between the mechanical theory and the theory of free legal decision has been waged over the relation of the judges to public policy and over the nature and scope of judicial legislation. Those who support the mechanical theory hold that it is not the function of the judge to make or to change the law.² This theory refuses to recognize anything but formulated legal rules and the facts and the circumstances of a specific case. The advocates of mechanistic ideas in the United States have become the supporters of the eighteenth-century dictum that the ideal to seek is "a government of laws and not of men" and they deprecate the tendency to depart from definite legal rules in the administration of justice. They see grave dangers in the theory of free legal decision and oppose the modern tendencies to increase the range of discretion of judges. They believe that the human element is an undependable thing in administering justice and that little discretion should be given to the judges and even then carefully defined limits should be placed on its exercise. The judge is lauded who aims to arrive by a rigidly mathematical process at the "inherently and necessarily just."³

¹ Cf. art. 38 and *Procès-verbaux* of the Proceedings of the Advisory Committee of Jurists, pp. 281 ff. These principles were not formulated or defined but were thought to be founded on "the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilized nations." M. le Baron Descamps, *Procès-verbaux*, pp. 310, 311.

² According to Elihu Root the appeal to courts in the matter of social reform rests upon a misconception of the true function of a court. It is not within the judge's function or within his power to enlarge or improve or change law. *The Independent*, LXXII (April 4, 1912), 704; James Coolidge Carter, *Law: Its Origin, Growth and Function* (New York, 1907), pp. 172, 173. For opposite view, see John F. Dillon, *The Laws and Jurisprudence of England and America*, p. 267.

³ E. V. Abbot, *Justice and the Modern Law*, pp. 10 ff.

The common law system is largely a product of judge-made law.¹ And, as we have seen, concepts of the law of reason or law of nature have had a large place in the development of various branches of the common law.² The fiction that the judges find the law and apply it in a mechanical or slot-machine fashion cannot have been taken seriously by the judges and must have been recognized as having a thin veneer of truth by those not versed in legal lore. At least the proponents of the fiction are becoming less and their avowal of the automaton function of the judge is not so insistent. But more significant is the frank recognition of the duty of judges in common law jurisdictions to assist in the lawmaking processes. "The system of law making by judicial decisions which supply the rule for transactions closed before the decision was announced," Justice Cardozo thinks,

would be indeed intolerable in its hardship and oppression if natural law, in the sense in which I have used the term, did not supply the main rule of judgment to the judge when precedent and custom fail or are displaced. Acquiescence in such a method has its basis in the belief that when the law has left the situation uncovered by any pre-existing rule, there is nothing to do except to have some impartial arbiter declare what fair and reasonable men, mindful of the habits of life of the community, and of the standards of justice and fair dealing prevalent among them, ought in such circumstances to do, with no rules except those of custom and conscience to regulate their conduct.³

While there are many opportunities for the influence of personality and of individual views on economics and social policy in the realm of private law through the development of the common law and through the interpretation of statutes, there is a much larger range for free legal decision in the main branches of public law. And this range has been greatly extended in American constitutional law where wide latitude

¹ A. V. Dicey, Lecture on "Judicial Legislation," in *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London, 1926), pp. 359, 360.

² *Supra*, pp. 39 ff.

³ *Op. cit.*, pp. 142, 143.

has been assumed in the interpretation of such doctrines as implied limitations on legislatures, due process of law, vested rights free from legislative interference, equal protection of the laws, and the phrases "the nature of republican government" and "the spirit of the constitution."¹ Moreover, the judges, in interpreting the provisions of American constitutions, formerly had no guidance from precedents or established rules and, directed by their own reason, they reached conclusions largely controlled by the influences, opinions, and prejudices to which the justices had been subjected.² President Roosevelt in December, 1908, observed:

The chief law makers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and since such interpretation is fundamental, they give direction to all law making. The decisions of the courts on economic and social questions depend upon their economic and social philosophy.³

In the terms of the theory of free legal decision, the law is, as a justice of the Supreme Court aptly called it, "a progressive science" in which it is the duty of judges to foster and direct the process of growth. And it is the business of judges by so-called "constructive decisions" to see that the law is made to accord with that somewhat uncertain and elusive

¹ Justice Cardozo thinks that in the field of constitutional law in the United States the method of free decision is dominant today. *Op. cit.*, p. 17. Agreeing with this view Judge Bruce says, "we are governed by our judges and not by our legislatures. . . . It is our judges who formulate our public policies and our basic law." *The American Judge* (New York, 1924), pp. 6-8.

² W. D. Coles, "Politics and the Supreme Court of the United States," *American Law Review*, XXVII (March-April, 1893), 189, 190.

³ Emphasizing the same thought at a dinner to Justice Harlan after twenty-five years' service on the Supreme Bench, President Roosevelt said: "For the judges of the Supreme Court of the land must be not only great jurists, but they must be great constructive statesmen, and the truth of what I say is illustrated by every study of American statesmanship, for in not one serious study of American political life will it be possible to omit the immense part played by the Supreme Court in the creation, not merely the modification, of the great policies through and by means of which the country has moved on to her present position." *Amer. Law Rev.*, XXXVII (January-February, 1903), 93.

thing known as "the prevailing morality or strong and preponderant opinion."¹ In this view it becomes the function of the judges to legislate and to be guided by public policy — in fact, to see that the law accords with the dominant social and political doctrines.

The result in a large number of cases cannot be reached, it is contended, by a strict and logical application of a constitutional text, but instead the courts must decide upon the basis of external facts of which judicial notice is taken. Much depends on the extent to which such facts are recognized and considered. Moreover, where the words of the Constitution, such as "due process of law" have no technical significance and the judges must seek a conclusion without definite guidance, "the meaning given to such words is necessarily influenced by all that makes up in any fundamental way the thoughts of those who are to find the meaning."²

In many cases arising in public law in the United States justices are called upon to apply indefinite terms which have political and economic significance and it is here that the personal element or free decision chiefly enters. Evidences of personal opinions are particularly found when courts deal with such matters as the reasonableness of building regulations, public utility regulations, the wholesomeness of foods, public purpose for taxation, and public use for eminent domain. In an extensive review of some of these cases Professor Barnett observes, "there is certainly no principle of law whatever to be found in this mass of contradictions. In fact, courts simply deem it proper to review legislative decisions in the case of some statutes, and improper to do so in case of others."³

It is evident that free legal decision plays an important rôle

¹ *Noble State Bank v. Haskell*, 219 U. S. 104, 111 (1911).

² W. F. Dodd, "The Problem of State Constitutional Construction," *Columbia Law Review*, XX (June, 1920), 636.

³ James D. Barnett, "External Evidence of the Constitutionality of Statutes," *Amer. Law Rev.*, LVIII (January-February, 1924), 88.

in the decisions of judges applying the general terms of written constitutions. At no point has free decision been more frequently called into service than in the interpretation of the phrases "due process of law" and "equal protection of the laws," whereby much of the old natural rights philosophy has been injected into the Constitution. And remarkable consequences have resulted from the enlargement of the meaning of these terms by decisions which had the effect of constitutional amendments. For fundamental social policies have been formulated by the judges and have been declared to be a part of the fundamental law, hence impossible to change except through the difficult process of amendment. Whenever judges attempt to measure the standards of justice of positive laws or to fill the gaps in enacted law they turn to doctrines of natural right or natural law or to general principles of right for which objective validity is claimed.

Referring to the interesting theories of the law of nature, and the tendency of the Analytical School of jurists to discredit such ideas, Justice Cardozo says,

recent juristic thought has given it a new currency, though in a form so profoundly altered that the old theory survives in little more than name. The law of nature is no longer conceived of as something static and eternal. It does not override human or positive law. It is the stuff out of which human or positive law is to be woven, when other sources fail.¹

As he views the trend of the times, the exponents of the new natural law and of the modern philosophy of law are joining in the efforts to discover the elements of the just in and beyond the positive law.²

Justice Cardozo maintains he is not

concerned to vindicate the accuracy of the nomenclature by which the dictates of reason and conscience which the judge is under a duty

¹ *Op. cit.*, pp. 131, 132.

² Cardozo, *op. cit.*, p. 132, and Berolzheimer, *System der Rechts- und Wirtschaftsphilosophie*, II, 27.

to obey, are given the name of law before he has embodied them in a judgment and set the *imprimatur* of the law upon them. I shall not be troubled if we say with Austin and Holland and Gray and many others that till then they are moral precepts, and nothing more. Such verbal disputations do not greatly interest me. What really matters is this, that the judge is under a duty, within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.¹

In the opinion of Sir Frederick Pollock natural law will have a large and dominant part in the development of whole branches of modern law, as for example, in the efforts of legislatures and courts to restrict unfair methods of competition and unfair restraints of trade. Speaking of the misconception of the law of nature which was current in the eighteenth and nineteenth centuries, Pollock says,

the law of nature is not competent to resolve specific problems off-hand. Neither, for that matter, are the general principles of any other science. The law of nature is not the chaos of individual opinions but the tradition of universal reason confirmed by the general custom of civilized mankind. . . . Natural justice founded in reason is verified by the use of just men, is recognized and applied by judicial authorities no less than the rules of international law, which ultimately rest on the same ground.²

If it is the customary morality of right-minded men and women which the judges are to enforce, natural law standards as conceived by them and as developed by the scholars and commentators, will serve as an invaluable guide.³

¹ Cardozo, *op. cit.*, p. 133.

² Review of Professor Brown's *International Society: Its Nature and Interests*, *Law Quar. Rev.*, XXXIX (1923). "The best and most rational portion of English law is in the main *judge-made* law. Our judges have always shown, and still show, a really marvelous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances." Pollock, *Law Quar. Rev.*, IX (April, 1893), 106.

"The besetting danger of modern law," to Pollock, "is the tendency of complex facts and minute legislation to leave no room for natural growth, and to choke out the life of principles under a weight of dead matter which posterity may think no better than a rubbish heap." *The Expansion of the Common Law*, p. 8.

³ Cardozo, *op. cit.*, p. 106. "Another significant current of thought connected with the evolutionist movement in jurisprudence may be seen in the revival of a

4. *Higher Law Theories as a Basis for Limits on State Sovereignty.* The revival of theories of natural law or of natural rights is receiving aid from divergent currents of political and social life. Among these currents one which tends to place limits on the omni-competence of the state and to discredit the traditional theories of state sovereignty leads directly towards theories of higher laws. For centuries political rulers and certain schools of jurists looked upon the state as the exclusive lawmaking agency and the dictum of Hobbes that no law made by the state can be unjust¹ was generally accepted despite the continuous undercurrents in opposition. Theories of state omni-competence and of the absolutist dogmas of sovereignty which came in their wake evolved from conditions which were unfavorable to the support of limits on public authorities.²

The extremes in theory and practice to which the adherents of state omni-competence went have brought a reaction in a well-defined trend of political thinking. "The notion of sovereignty must be expunged from political theory,"³ says one of the foremost opponents of the traditional dogmas of state sovereignty.

Most opponents of the doctrine of state sovereignty contend that no such an independent and supreme power exists in any political society; that the unity and all-inclusiveness

modified conception of the law of nature — not in the rationalist sense, of course, but in that of a striving toward ideals. If, as Ihering put it, law has not only to register actual rules and to explain their origin, but also aim at the solution of social problems, it is not wrong or presumptuous to reflect on the general principles which in the present state of civilization we ought to accept as the guiding lights for legislators and reformers, and as the critical tests for approving or disapproving existing rules of positive law." Vinogradoff, *Historical Jurisprudence*, I, 144, 145.

¹ *Leviathan*, chap. 30. For a similar view see John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* (5th ed., London, 1885), pp. 268 ff.

² A short summary may be found in F. W. Coker, "Pluralistic Theories and the Attack upon State Sovereignty," in *A History of Political Theories: Recent Times*, edited by Charles E. Merriam and H. E. Barnes (New York, 1924), pp. 81 ff.

³ H. Krabbe, *The Modern Idea of the State*, trans. by George H. Sabine and Walter J. Shepard (New York, 1922), p. 35. See also A. D. Lindsay, "The State in Recent Political Theory," *Political Quarterly*, I (February, 1914), 128-145.

claimed for this power is, in fact, broken by the divided allegiance which men give to the various social groups to which they belong; that state authority applies to only a small part of human conduct, and that this authority is subject to certain definite limitations, even within this restricted field.¹

Critics of former theories of sovereignty appear to be seeking certain fundamental principles as the basis of political obligation. Whether the source and sanction of political control be sought in a sovereign, in some kind of general will or social force, or simply in the rule of the majority, there is an insistent demand for some criterion to pass on the efficacy or validity of political acts. Such criteria were found formerly in the theory of natural rights and in the theory of a social compact.²

The recent extraordinary enlargement of state functions requires that the sovereign, if there be such, in many of its activities must be subjected to certain rules of law. At the same time a similar growth of international rules and practices requires further limitations on the sovereign, according to other legal rules. From the standpoint of those interested in the growth of international law the traditional theory of sovereignty is condemned as a political dogma no longer in harmony with the facts of international life and "incompatible with the existence of a society of states governed by a

¹ Coker, *op. cit.*, p. 89, and Louis Le Fur, "La souveraineté et le droit," *Revue du droit public*, XXV (1908), 389.

Among the critics of the prevailing doctrines of sovereignty, see Léon Duguit, *Law in the Modern State* (New York, 1919); H. Krabbe, *The Modern Idea of the State* (New York, 1922); Harold J. Laski, *Problem of Sovereignty* (New Haven, 1917); *Authority in the Modern State* (New Haven, 1919); *The Foundations of Sovereignty and Other Essays* (New York, 1921); and Ernest Barker, "The Superstition of the State," *London Times Literary Supplement* (July, 1918), p. 329.

² "When we turn to history for evidence of the cultural tradition of the state and of its relation to law, we find the overwhelming weight of authority opposed to the absolutistic view of sovereignty and of the State and denying the alleged independence of both from the limitations embodied in the conception of law." E. M. Borchard, *Yale Law Journal*, XXXVI, 1039.

recognized and generally observed system of international law.”¹ If the sovereign be made subject to a developing body of rules of law in both private and public law, the theory of an absolute sovereign has ceased to have its former all-inclusiveness. Older theories of sovereignty which still retain feudal and monarchic characteristics are apparently in need of revision. “A certain tendency to discredit the state is now abroad. The forces which combine to spread this tendency are various. There is the old doctrine of natural rights, which lies behind most of the contemporary movements that advocate resistance to the authorities of the state.”²

According to Duguit the notion of sovereignty is merely a survival of the conception of the princely state. “By denying the personality of the state, the sovereignty,” he claims, “we disengage ourselves from a valueless and meaningless anthropomorphism and we reject absolutely all the remaining balance of the feudal and princely conception of the state.”³

Following a period of emphasis upon law as an emanation from a sovereign authority and upon rights as created by such

¹ See *Harv. Law Rev.*, XXXVI (February, 1923), 495; James W. Garner, “Limitations on Sovereignty in International Relations,” *American Political Science Review*, XIX (February, 1925), 1; and E. M. Borchard, “Political Theory and International Law,” in *A History of Political Theories: Recent Times* (New York, 1924), p. 120.

² W. Y. Elliot, “Sovereign State or Sovereign Group,” *Amer. Pol. Sci. Rev.*, XIX (August, 1925), 482.

Geny, an advocate of the doctrine of natural rights, regards sovereignty as a postulate which is contrary to the facts and conditions of social life. *Science et technique en droit privé positif*, I, 75.

Surveying the recent progress of political thought in continental Europe, Vinogradoff suggests that “in modern Europe itself there is a marked recurrence of the view that the state is subject to the authority of a higher law. This recurrence may be traced to the wide-spread discontent with the policies of modern states in championing the interests of economic imperialism. The theory culminates in the assertion that it is society which creates law and not the state. Society creates law by developing and applying certain propositions conceived as reasonable and just. In this respect it is not reason as given by Providence and not reason given once for all by human nature, but reason conceived by public opinion and public morality at a particular time.” “The Juridical Nature of the State,” *Mich. Law Rev.*, XXXIII (December, 1924), 138-142.

³ Duguit, *Traité de droit constitutionnel*, vol. I, chap. 5.

an authority there is a reversion again to the inherent rights of the individual and to the necessity of the protection of these rights. This recurrence to the natural rights of the individual renders it imperative once more to seek limits to the competency of the political powers of the state or to find ways of placing restrictions on the presumed sovereignty of the state. Two well-known English political thinkers, who approach the matter from different points of view, may be referred to as indicating in their works the intention to revive interest in natural rights. "I have," Mr. Laski urges, "rights which are inherent in me as a member of society; and I judge the state, as the fundamental instrument of society, by the manner in which it seeks to secure for me the substance of those rights. . . . Rights, in this sense, are the groundwork of the state. They are the quality which gives to the exercise of its power a moral penumbra. And they are natural rights in the sense that they are necessary to the good life."¹ Laski believes that a creative view of politics begins in a proper theory of rights. He outlines a functional theory whereby the individual as a person has rights which the state does not create but must recognize in order that the individual may realize his best self. Among the inherent rights of the individual which it is the duty of the state to preserve and protect, he enumerates the right to work, the right to be paid an adequate wage, and to have reasonable hours of work, the right to an education, and the right to participate in the functions of government.

To give vitality to these views it is necessary to insist that there are limits to the exercise of public authority and hence he believes any working theory of the state must concern itself with the efforts to devise limits upon those who exercise powers. The modern concept of an unlimited and relatively absolute sovereign is therefore incompatible with the

¹ *A Grammar of Politics* (New Haven, 1925), pp. 39, 40.

preservation of these natural rights and in his judgment the concept should be discarded.¹

Dealing with the same problem from the standpoint of jurisprudence rather than political theory, Sir Paul Vinogradoff raises the inquiry whether "certain fundamental rights and claims ought not to be treated as inherent in the nature of a freeman and a citizen."² Showing that to a considerable extent the appeal to natural and imprescriptible rights was made in the eighteenth century in the struggle for freedom of conscience against state absolutism in religious matters, Vinogradoff affirms: "It is of great importance to ascertain that there are claims of right which flow naturally from the conception of human personality as a free agent and as entitled in normal circumstances to certain legal guarantees of the realization of welfare."³

Even the great advocate in France of the supremacy of the state, M. Esmein, admitted that the individual had rights anterior and superior to those of the state, which must be respected by the state. As an essential element of constitutional law this principle forbids the sovereign from interfering with individual rights and requires it to take the necessary steps to preserve such rights.⁴

¹ See especially *op. cit.*, chaps. 2 and 3.

² "The Foundations of a Theory of Rights," *Yale Law Jour.*, XXXIV (November, 1924), 64.

³ *Ibid.*, p. 67. "As a general conclusion," Vinogradoff asserts, "it may be said that the will of the state is not the one factor in building up Right and Law in human society. There is a second factor of equal importance — the consciousness of men as to their rights. In practice Law appears as a shifting compromise between these two factors." *Ibid.*, p. 69. At another time, he defends the main proposition of Duguit's political philosophy in these words: "The attempt to define the nature of the state in juridical terms is not a quibble of the lawyers. It is an obvious consequence of the view that state and government in a civilized country, in spite of their might have to conform to a rule of law, and that the more closely their functions are subjected to the application of ordinary legal rules and methods, the better will be the guarantees against oppression, corruption and arbitrary measures." *Historical Jurisprudence*, I, 92.

⁴ Esmein, *Droit constitutionnel* (Barthélemy's ed., 1915), pp. 29, 30; also Duguit, "The Law and the State," *Harv. Law Rev.*, XXXI, 38.

An exponent of the theory that the concept of sovereignty should be abandoned

Formerly international law recognized states as sovereign and subject only to those limitations to which they had consented. Now, it is contended, international law must be reconstructed on a new basis.¹ Advocates of this reconstruction discard at the outset the concept of the state with its absolute sovereignty, as a metaphysical abstraction. The old law of nations which was regarded as nothing more than regulations between states is to be replaced by a new law conceived as existing above states. "The final triumph of the new conception of international law will be assured," thinks N. Politis, "because of the irremediable ruin which results from the other fundamental principle of the classical doctrine, that of sovereignty."² The concept of sovereignty is held to be inadmissible and the state is regarded as not invested with absolute power but as charged with a social mission which requires that its actions be controlled by rules of law (*droit*). One of the most direct attacks on the older concepts of sovereignty is made in the interest of the establishment of a secure basis for international law.³

5. *Limits on the Power to amend Constitutions in America due to Fundamental Principles and Rights.* A renewal of efforts to revive a type of higher law philosophy is found in the attempts in American political thinking to place certain limits on the power of the people to amend written constitutions. Amending procedure in the United States was left

is Charles Benoist. For a summary of his views see Duguit, "The Law and the State," *op. cit.*, pp. 171 ff. Benoist became the advocate of a measure to establish in France a supreme court whose duty it should be to uphold the constitution and to prevent violations thereof by the legislative and executive powers. *Journal officiel, documents parlementaires*, Chambre 1903, session ordinaire, pp. 95, 99.

¹ N. Politis, "Les limitations de la souveraineté," *Revue de Paris*, XXXIII (March, 1926), 7. Politis is an advocate of the views espoused by Duguit. He also regards the state as bound by rules of law.

² *Ibid.*, p. 9.

³ N. Politis, "Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux," *Académie de droit international*, VI (1925), 1-121; also Goicochea, *El problema de las limitaciones de la soberanía en el derecho público contemporáneo* (Madrid, 1923).

largely to political control and direction until toward the close of the nineteenth century. Judicial control over the process of amending state constitutions was asserted only once prior to 1880.¹ The next few decades witnessed not only an increasing exercise of the right of judicial control over amendments but also the gradual emergence of a distinction between amendments and additions. Justice Story had suggested the notion of inherent limits on the power of amendment under the federal Constitution when, referring to the adoption of the Constitution by the people, he said: "The Union which is perfected by means of it is indissoluble through any steps contemplated by, or admissible under, its provisions or on the principles on which it is based, and can only be overthrown by physical force effecting a revolution."² Following this view it was not infrequently asserted that no amendment could be made which would lead to the destruction of either the Union or the states, or that amendments interfering with the sovereignty either of the states or the nation would be void. Justice Cooley, the foremost advocate of the doctrine of implied limitations on legislatures in order to protect vested rights, believed that there are certain inherent limitations — principles which underlie the federal Constitution and which prevent its radical amendment. Amendments, he insisted, "cannot be revolutionary; they must be harmonious with the body of the instrument."³ But in a practical, concrete way little significance was attached to this idea until the extension of judicial review of legislative enactments provided a convenient method to

¹ *Collier v. Frierson*, 24 Ala. 100 (1854), holding that the procedure defined in the constitution not having been strictly followed, an amendment approved by the people was invalid. Cf. W. F. Dodd, "Amending the Federal Constitution," *Yale Law Jour.*, XXX (February, 1921), 321.

² *Story on the Constitution* (5th ed. by Cooley), I, 223.

³ T. M. Cooley, "Power to Amend the Federal Constitution," *Michigan Law Journal* (April, 1893). For Cooley's comments on natural rights see *ibid.* (June, 1894).

apply limitations to the amending process.¹ Thus it became customary to assert that amendments were invalid which contravened the general principles of free republican government, that interfered with the natural rights of life and liberty, or that took away fundamental rights of either the nation or the states.

The attempt to apply the doctrine that there are limits to the amending power under the federal Constitution have arisen primarily in the enactment and interpretation of the Thirteenth, Fourteenth, and Fifteenth Amendments² and have acquired greater significance in the movement to hold ineffective the Eighteenth Amendment. The attack on the Civil War Amendments on this ground have not been so persistent and vigorous because these amendments were regarded mainly, in their original purpose, as declaratory of the natural rights of man.³

In the briefs on the cases before the Supreme Court attacking the validity of the Eighteenth Amendment a special

¹ State *ex. rel.* *Halliburton v. Roach*, 230 Mo. 408, 130 S. W. 689 (1910), initiative petition to submit to the people an amendment to the state constitution was held not to be an amendment but a statutory enactment. The court passed upon the legal sufficiency of a petition to amend the constitution. See dissent of Justice Woodson.

² See Judge M. F. Morris, "The Fifteenth Amendment to the Federal Constitution," *North American Review*, CLXXXIX (January, 1909), 82. In the opinion of Judge Morris a distinction must be made between an addition and an amendment to the Constitution. An addition, he suggests, requires the unanimous consent of the states. *Ibid.*, p. 85.

³ Justin Dupratt White, "Is There an Eighteenth Amendment?" *Cornell Law Quarterly*, V (January, 1920), 113.

Mr. White contends that, on the general theories assumed as a basis for the American system of government, intra-state prohibition cannot be the subject of a valid constitutional amendment, that the consent of the people of all of the states is necessary for such a change, or that such consent must be given through conventions called for this purpose in the states. Certain amendments such as those seeking to reorganize state governments or to interfere with their vital powers are regarded as improper. All of the amendments to the federal Constitution prior to the Eighteenth are thought to be "assertive of those fundamental rights which are the foundation of a republican form of government." The dictum of Chief Justice Chase in *Texas v. White*, 7 Wall. 700, 725 (1868), that "the Constitution in all of its provisions looks to an indestructible union of indestructible states" is taken to mean that the federal character of the Union cannot be changed except by revolution.

effort was made to revive Story's notion of implied limits on the amending power by arguments based upon the nature of the federal system.¹ Elihu Root argued that "any amendment which impairs or tends directly to destroy the right and power of the several states and of local self-government should be held void as in conflict with the intent and spirit of implied limitations of the federal Constitution adopted by the people of the United States."² It was also claimed that certain principles of the Constitution are unamendable and as an example due process of law was cited as a matter so vital to free government that it may not be destroyed. The Supreme Court substantially rejected all of the arguments presented in favor of such limitations, but the issue has not been dropped in federal constitutional law and the advocates of these doctrines have turned to the states where a more fruitful field is open for the application of implied limits on legislative and constituent powers.

A significant attempt is being made to revive interest in the philosophy and dogmas of the seventeenth and eighteenth centuries in support of the view that indubitable private rights must be preserved, anything in laws or constitutions to the contrary notwithstanding. Mr. Abbot, defender of this return to natural and inalienable rights, asserts "the indisputable truth is that there are rights which

¹ Cf. Briefs in the case of *Rhode Island v. Palmer*, pp. 29, 66, and in the *Kentucky Distilleries and Warehouse Co. v. Gregory*, 41, and *Dodd*, *op. cit.*, pp. 330 ff.

² Brief in case of *Feigenspan v. Bodine*, p. 64. For argument favoring limitations on the federal amending power see George Ticknor Curtis, *Constitutional History of the United States*, II, 160. See George D. Skinner, "Intrinsic Limitations on the Power of Constitutional Amendment," *Mich. Law Rev.*, XVIII (January, 1920), 213. Mr. Skinner insists that the Ninth and Tenth Amendments are unamendable — that "the essential form and character of the government being determined by the location and distribution of powers cannot be changed." Also W. L. Marbury, "The Limitations upon the Amending Power," *Harv. Law Rev.*, XXXIII (December, 1919), 223. Mr. Marbury claims that the power to amend does not include the power to destroy the Constitution nor does it include the power to enact ordinary legislation. William L. Frierson replied to Mr. Marbury, *Harv. Law Rev.*, XXXIII (March, 1920), 659.

no government can lawfully invade. The man who does not believe in them does not understand the difference between right and wrong, does not understand human nature, and does not learn from experience." He thinks the protection of these inalienable and reserved rights is to be preserved under the inexpugnable law of the land, or due process clause. There is, he insists, no power resident anywhere in the Union which can overturn this constitutional principle. "There are," he comments, "a number of constitutive principles of private right which have been so wrought into the fabric of our institutions that they cannot be abrogated." Among these indubitable rights he suggests the use of the natural powers in the pursuit of happiness as long as they do not thereby injure others, and the right of hearing when a man's liberties are at stake; and he concludes that "we find in this country, at least, it is held to be axiomatic, that there are limitations to the power of all government and if so, there are limitations to the power of amending the Constitution of the United States."¹

The doctrine of higher law or of fundamental principles as a basis for limits to be applied to the amending procedure of the federal Constitution is seldom advocated. American legal thought more commonly follows the doctrine that there are no inalienable rights, that legal rights exist only through law, and that such a thing as a right in any legal sense against the sovereign political authority is unthinkable. From this viewpoint unlimited sovereignty resides only in the people.² It is well to recognize, however, that the doctrine of limitations on the power of the people to amend constitutions is much more commonly accepted than is ordinarily believed,

¹ E. V. Abbot, "Inalienable Rights and the Eighteenth Amendment," *Col. Law Rev.*, XX (February, 1920), 183 ff. See also Henry Wynans Jessup, *The Bill of Rights and its Destruction by Alleged Due Process of Law* (Chicago, 1927).

² For the generally accepted theory of American lawyers, see D. O. McGovney, "Is the Eighteenth Amendment Void because of its Contents?" *Col. Law Rev.*, XX (May, 1920), 449.

that it is a factor not to be ignored in constitutional interpretation, and that when ostensibly repudiated as a legal doctrine it has found its way in judicial decisions in covert processes of legal reasoning.¹

With the extraordinary growth of the functions of government during the last century, and with a corresponding increase in the number of public officials who are engaged in carrying on these functions, has come a confirmed conviction that some limits must be set to the activities of these functionaries. Jefferson's observation that many despots in a legislative assembly are more to be feared than one has not ceased to gain converts as governments have become increasingly popular in origins and sanctions.² It was to be expected that *laissez faire* exponents of the eighteenth and early nineteenth centuries would seek to limit governmental functions, to divide public powers, and to favor a refined system of checks and balances. It is more difficult to understand why the advocates of popular government and of the extensions of its functions along all lines should at the same time be concerned with fixing limits to the exercise of these functions.

This effort to define the field within which the public officers are permitted to function has two significant phases — one designed to keep officers near to and responsive to public sentiment and to guard certain personal rights and privileges from official encroachment, and another, a direct result of former *laissez faire* theories, which is designed to prevent

¹ See *People v. Western Union Co.*, 70 Col. 90 (1921), and *People v. Marx*, 70 Col. 100 (1921), for an interesting application of the limits on the power of the people to amend state constitutions. A defence of our natural and inherent rights for whose security and preservation our government was instituted, is made by Max Schoetz, "Natural and Inherent Rights protected by the Fourteenth and Fifteenth Amendments of the Constitution of the United States," *Marquette Law Review*, VII (1922-23), 154.

² A bill of rights, Jefferson observed, "is what the people are entitled to against every government on earth, general or particular." Letter to Madison. Dec. 20, 1781.

the public from invading the individual and corporate rights and privileges of property and contract. The latter forms the basis for the protection of acquired or vested rights. The first of these phases is exemplified especially in the growing tendency to formulate as a part of the public fundamental law bills or charters of individual rights which are regarded in varying degrees as inviolable. In this respect the Declaration of Independence, the bills of rights in the state and federal constitutions of the United States, and the French Declaration of the Rights of Man began a movement which has influenced greatly the entire process of the development of constitutional law.

The other phase of the movement, the disposition to use higher law ideas to protect acquired or vested rights was a gradual development in connection with the emergence of constitutional government. It has had a unique application in the United States where property owners and corporate organizations have been accorded greater privileges than in any other country. These privileges are protected by an independent judiciary upholding the limitations of a written constitution and of higher laws above the constitution.¹

6. *Concluding Comments.* Duguit would have all law conform to an *objective right*,² and other Frenchmen plead for the renaissance of natural law, now a term conceived as involving fundamental principles changing in content and significance with each generation.³ Krabbe would have all law conform

¹ "The whole American political and social system is based on industrial property right, far more completely than has ever been the case in any European country." A. T. Hadley, *Undercurrents in American Politics* (New Haven, 1915), p. 33. See especially the chapter in this volume on "The Constitutional Position of the Property Owner."

² *Traité de droit constitutionnel*, I, 16. "It is above all in the atmosphere of American life," says Mr. Laski, "that the broad accuracy of M. Duguit's interpretation finds its most striking evidence. The whole background of American constitutionalism is a belief in the supremacy of reason." "A Note on M. Duguit," *Harv. Law Rev.* XXXI (November, 1917), 192.

³ Charmont, *La Renaissance du droit naturel* and *Modern French Legal Philosophy* in *Modern Legal Philosophy Series*, pp. 106 ff.

to the community sense of the feeling for right.¹ The gap is not so great after all between the broad rule of reason applied by American justices permitting only those things which do not "shock men's sense of right" and the concepts of higher law now prevalent on the continent of Europe. But it is a different matter for a rule of reason, an objective right, or a feeling for right to form the basis of legal reasoning of justices or of the observations of legal philosophers instead of a more or less mechanical measure to test the validity of legislation. The United States is practically alone in placing supercensors over its legislative chambers with often nothing more than the elusive rule of reason as a standard.²

Throughout the evolution of the law there has always been a disposition to seek for law in sources external to man and his lawmaking and law-enforcing agencies. If the law itself is not regarded as originating in such external sources there has been an urgent desire to discover standards outside of the law, or as a significant part of it, to evaluate its justice and fairness in determining the legal relations among men.³ Law is comprised not alone of *rules* but of *principles*, *conceptions*, and *standards*. And from the standpoint of the unity, continuity, and permanence of the law the principles, concep-

¹ *The Modern Idea of the State*, chap. 3.

² "The test of reasonableness is, of course, one that it is seldom easy to apply in a court of law. For it always raises issues which in their nature are ultimately questions of opinion, and it tempts the judge to believe that he is simply finding the law when in fact he is really testing and rejecting other men's views by the light of his own. In arriving at the meaning of this conception, it is therefore urgent for the judge to be certain that he has surveyed the whole ground." Harold J. Laski, "Judicial Review of Social Policy in England: A Study of *Roberts v. Hopwood et al.*" *Harv. Law Rev.*, XXXIX (May, 1926), 832, 842. See (1925) A. C. 578. "Reasonableness then means not a view arrived at by men who, having taken steps to inform themselves of the facts relevant to a decision, arrive at a considered view, but what the courts think they should have come to hold; and they (local councils) will have to pay out of their personal fortune for acting upon a faith different from that of the House of Lords." *Ibid.*, p. 845.

³ "'Objective law,' 'social solidarity,' man's 'sense of right,' like 'natural law' which has dominated men's thinking and molded legislative and judge-made law, are value-standards which embody an implicit dogmatism transcending experience and expressing both an ideal and the quest for and supposed need of perfection and the absolute." Borchard, *Yale Law Jour.*, XXXVI, 1091.

tions, and standards are more important than the rules.¹ It is in the former that the ideas involved in the phrase "natural law" are always in evidence. When the principle is announced that one person is not to be enriched *unjustly* at the expense of another, what is *unjust* enrichment and by what criterion will such conduct be judged? Similarly, when legislatures and courts lay down the principle that business competition shall not be conducted unfairly, what is the standard by which competition is declared unfair? If unfair competition is anything else than what Judge Hough called the selling of goods by means that "shock judicial sensibilities,"² how is the line determined between what does and does not shock judicial sensibilities? What criteria are involved in judgments which insist that the conduct of a fiduciary shall be fair, that public utilities shall receive a fair return upon a reasonable valuation of their property, or that regulations affecting such utilities must be reasonable? The ultimate standard of what is reasonable or fair is the judicial conscience. But what are the controlling factors which turn the scales of justice? Evidently judges, in forming moral judgments on conduct as to whether it is fair or reasonable, are guided by common sense and intuition based on experience. The rule of reason which they are constantly applying has a close resemblance to the ancient and mediaeval concepts of the law of nature, which were accepted as guiding factors of the English common law in its "rules of reason."

It is contended that advocates of theories of natural law usually try to defend certain special interests and that they make their own personal views the test of the validity of legal precepts. Writers have not infrequently aimed to project into the realm of universal laws their own personal and

¹ Pound, "The Administrative Application of Legal Standards," *Amer. Bar Assn. Reports*, XLIV, 445.

² *Steiff v. Bing*, 215 Fed. 204, 206 (1914).

subjective sentiments and it has been difficult to draw a line between such subjective views and the presumed objective rules to which recurrence is usually made as having general validity. It is the subjective phases of natural law theories which are often emphasized to the discredit of all such theorizing.¹ Though there are many indications in natural law thinking of frank or covert appeals to higher laws for the sake of expediency, such instances by no means comprise all of the cases in which superior law concepts are employed.

Natural law theories seem to be conceived and applied for diverse reasons by the absolutists, by the individualists, by the pragmatists, and by those whose legal thinking is inarticulate and subconscious.

From the time men put their thoughts into definite written form there were some who sought the essential and the real qualities of man's social life in external sources, such as God or nature. From this external source come certain absolute ideas or standards which can be comprehended by human thought. Those who find it convenient and comforting to anchor their thinking in concepts of an absolute are likely to conceive as a part of such an absolute certain of the directive principles of social control by means of law. The search for absolute ideas in connection with law as in the field of religion may be inspired by quite divergent motives. But the religious and metaphysical approaches to philosophy frequently lead in the direction of a natural law with absolute connotations.

Starting with an assumption that men lived originally in a state of nature which was governed by the laws of nature, the individualists found a basis for law and rights in the inherent qualities which belonged to men as individuals and as social beings. Doctrines of freedom and equality and of rights to live, possess property, and enjoy certain privileges unmo-

¹ Pound, *Law and Morals* (2d ed.), pp. 90, 91; Pollock, *Essays in the Law*, p. 47.

lestest were supposed to flow from the conditions of birth and habitation in an environment subject to the laws of nature.

In the United States, where the individualistic viewpoint has been a dominant factor of political and social life, the doctrine of equality has resulted in three claims: that all men ought to be equal before the law, ought to have equal privileges of participation in political affairs, and ought to have equal opportunities. Though these claims have come far from practical realization, they have affected all phases of social and political life and have been reflected in numerous statutes and judicial decisions. The pronouncement in the Fourteenth Amendment that no person shall be denied the equal protection of the laws is the fruition of more than a century of equalitarian theories and of higher law ideas which accompanied them.¹

The pragmatists' approach to natural law needs little comment. Lawmaker or judge, finding the formal rules of the law unjust in their applications, appealed to a higher law of reason or of nature as his guide to secure a more rational and equitable result. Or, perchance, a group of individuals chafing under the dominion of men guided by laws or personal whims sought in the laws of nature a sanction for resistance to the established order and ultimately for rebellion. Thus the anarchists turned to natural law to sanction opposition to all forms of political authority at the same time that individuals and corporations sought support for the protection of their vested interests in the same law. The fact that natural law ideas can be turned to so many different uses weakens their efficacy when urged for any specific purpose.

The most difficult of all phases of the natural law philos-

¹ T. V. Smith, "Notes on the American Doctrine of Equality," *International Journal of Ethics*, XXXV, 164, 377; XXXVI, 31.

ophy to understand and evaluate is its inarticulate and unconscious or subconscious use.¹ As in the development of the common law, the thinking of lawyers and judges may be saturated with an unexpressed and unexplained philosophy which is none other than natural law. Or American judges revolting against the indefinite and vague terms "natural law" and "natural justice", may find a haven in due process of law, which is little else than a natural law given constitutional sanction — with the same vagueness and uncertainty inherent in the standard phrases. The assumptions, the principles, and the philosophies with which legal controversies and the devices for their settlement are approached are often more significant than the formal rules available for application.² In such assumptions, principles, or philosophies, one or more of the natural law theories is likely to lurk beneath the formal expressions and to determine partially at least the trend of legal judgments. It is the unexpressed and undefined natural law notions which may serve as a potent weapon to liberalize the law, as was the case with the evolution of English equity, or it may serve as a more sinister weapon when it is championed as a means of sustaining the legal *status quo*.

Along with the attitude of certain minds to search for ideals and to think in terms of universals there is the related habit of human thought to translate familiar and accepted ideas into the necessary and natural.³ And another tendency

¹ Cf. Cardozo, *op. cit.*, p. 167.

² "Implicit in every decision where the question is, so to speak, at large," says Justice Cardozo, "is a philosophy of the origin and aim of law, — the philosophy which, however veiled, is in truth the final arbiter . . . neither lawyer nor judge, pressing forward along one line or retreating along another, is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear." It is in a situation of this kind that "the personality of the judge, his taste, his training or his bent of mind, may prove the controlling factor." *Harv. Law Rev.*, XXXVII (1923), 282; see also *The Nature of the Judicial Process*, pp. 71, 90.

³ "The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere." Holmes, *Collected*

of the human mind which leads in the direction of natural law theories is suggested in some remarks of Justice Holmes. Speaking of "The Lantern-Bearers" of Robert Louis Stevenson, in which he shows how in their hearts all men are idealists, Holmes says: "The same laws are found everywhere, and everything is connected with everything else; and if this is so, there is nothing mean, and nothing in which may not be seen the universal law."¹

The claim that natural law theorists are merely assuming universal or general validity for their own subjective ideas of justice and rights by no means accounts for the assumptions, preconceived notions, or principles which have been associated with the natural law concept. Law in its generic sense is conceived as "the sense of justice taking form in peoples and races" and in the formation of men's ideas of justice there are some rules and principles which are thought to have universal validity.² It matters little whether these principles result from the instinctive, romantic, or religious sentiments of the people, or from the dominant juristic conceptions of a community such as the Anglo-Saxon fundamental principles of justice, or the principles which lie at the basis of free government, or from the free decision of justices applying the ethics and juristic ideas of certain classes — there is for any time and place a uniformity in the application of these principles which gives them a singular permanence and

Legal Papers (New York, 1920), p. 312. "Men in general are inclined to regard the habitual and the simple as identical with the necessary, and the natural." N. M. Korkunov, *General Theory of Law*, trans. by W. G. Hastings, p. 135.

¹ *Collected Legal Papers*, p. 159. Justice Holmes finds that the jurists' search for criteria of universal validity usually under the guise of natural law is the result of a demand for the superlative which is common to all men. *Ibid.*, p. 310.

² "Does not the interpretation of the will of the legislature," inquires Geny, "imply an incessant comparison of the formulae or principles which express an ideal of justice and of reason, — formulae which are outside of and above the law. These superior principles of an immanent right [*droit*] play a decisive rôle in the interpretation of positive laws." *Méthode d'interprétation et sources du droit privé positif* (2d ed., Paris, 1919), I, 43 ff.

definiteness. It makes a great difference in the results for the development of the law whether these principles or norms are treated as relative and variable or absolute and unchangeable;¹ whether they are applied by judges and legislators in a formalistic and mechanical way as determinate norms for the measurement of conduct or are used to test existing rules of law by standards of fairness and justice, which are constantly being subjected to critical analysis and modification by the legal profession; and whether they are employed as a means of legal growth or of the maintenance of a sanctified legal order.

¹ "The sanctification of ready-made antecedent universal principles as methods of thinking is the chief obstacle to the kind of thinking which is the indispensable prerequisite of steady, secure and intelligent social reforms in general and social advance by means of law in particular." John Dewey, "Logical Method and Law," *Corn. Law Quar.*, X (December, 1924), 27.

BIBLIOGRAPHY

BIBLIOGRAPHY

THE bibliography comprises a selected list of books and articles which are regarded of interest in the evolution of ideas relating to natural law.¹ As the consideration of natural law in many legal treatises is inseparable from the treatment of the philosophy of law, certain works are included which deal primarily with legal philosophy and incidentally consider natural law. Similarly natural law and the law of nations since the time of Grotius frequently have been treated together, and titles are included in which consideration of natural law is incidental to an analysis of international law. The discussion or exposition of natural law is to be found in so many treatises and under such diverse headings that it is quite impossible to give a complete and comprehensive list of titles relating to the subject. As a rule works which deal primarily with natural laws in the physical sense or with ethics and morality as separated from legal ideas are excluded. Many of the works on natural law appeared in numerous reprints and were translated into foreign languages. Obviously these reprints and translations could not be included in a selected bibliography.

I am indebted to Mr. John T. Vance, Law Librarian of the Library of Congress for the privilege of checking a list of about six hundred titles relating to natural law in its varied ramifications and to the Librarians of the Harvard Law Library for assistance in using the incomparable resources of that library. For a guide to foreign titles I received aid from the *Catalogue de la Bibliothèque du Palais de Paix*, The Hague, 1916 and 1922.

- Abbot, Everett V. Justice and the modern law. Boston and New York, 1913.
 — "Inalienable rights and the eighteenth amendment," *Columbia Law Review*, XX (February, 1920), 183.
 Abicht, Johann Heinrich. Kurze darstellung des natur- und völkerrechts zum gebrauch bei vorlesungen. Bayreuth, 1795.
 — Neues system eines aus der menschheit entwickelten naturrechts. Erlangen, 1792.
 Achenwall, Gottfried. Prolegomena ius naturae. Göttingen, 1758-74.
 Acolas, Émile. Introduction à l'étude du droit. 1885.
 — L'idée du droit. 2d ed. 1889.

¹ For a bibliography of works on natural law to the middle of the nineteenth century, consult Hermann Theoderick Schletter, *Handbuch der juristischen literatur* (Grimma, 1843), pp. 315 ff.

- Acquisto, B. d'. Corso di diritto naturale o filosofia del diritto. 2a ed. Palermo, 1856.
- Affolter, A. Naturgesetze und rechtsgesetze. München, 1904.
- "Cathrein: Recht, naturrecht und positives recht" (rezension), *Juristisches Literaturblatt*, XIV (1902), 11.
- Ahrens, Henri. Cours de droit naturel, ou de philosophie du droit complété dans les principales matières, par des aperçus historiques et politiques. Paris, 1838. 8^e éd. 2 vols. Leipzig, 1892.
- Naturrecht oder philosophie des rechts und des staates, auf dem grunde des ethischen zusammenhanges von recht und kultur. 6te, durchaus neu bearbeitete, durch die staatslehre und die principien des völkerrechts vermehrte, aufl. 2 vols. Wien, 1870-71.
- Alengry, Franck, ed. La déclaration des droits de l'homme et du citoyen. Paris, 1901.
- Alonso y Equilaz, J. El derecho natural: exposición de los principios universales del derecho con aplicación especial a los seres humanos. Madrid, 1870.
- Aquilanti, F. Filosofia del diritto. Roma, 1916.
- (Aquinas, St. Thomas). Institutiones juris naturalis seu philosophiae moralis universae secundum principia. Thomae Aquinatis ad usum scholarem adornavit Theodorus Meyer. Editio altera emendata. Friburgi Brisgoviae, 1906.
- Aristotle. Politics, vol. I, chap. 5; (Jowett's trans.), I, 7-8.
- Asquini, A. "La natura dei fatti come fonte di diritto," *Archivio Guiridico*, vol. LXXXVI (1921), no. 2.
- Audisio, Gulielmus. Iuris naturae et gentium privati et publici fundamenta. Roma, 1852. 4a. ed. Lipsiae, 1868.
- Avellar Brotero, J. M. Principios de direito natural. Rio de Janeiro, 1829.
- Bachiller y Morales, A. Elementos de la filosofía del derecho o curso de derecho natural. Habana, 1857.
- Barbeyrac (J.). Éléments du droit naturel, par Burlamaqui; et devoirs de l'homme et du citoyen tels qu'ils lui sont prescrits par loi naturelle; traduits du Latin de Pufendorf par Barbeyrac, avec les notes du traducteur et le jugement de Leibnitz. Nouvelle éd. Paris, 1820.
- Traité du jeu, où l'on examine les principales questions de droit naturel et de morale, qui ont du rapport à cette matière. 2 vols. Amsterdam, 1709.
- Baroli, Pietro. Diritto naturale privato e pubblico. Cremona, 1837.
- Bauer, Anton. Lehrbuch des naturrechts. 3te aufl. Göttingen, 1825.
- Beaussire, E. La liberté dans l'ordre intellectuel et moral. Études de droit naturel. Paris, 1866.
- Becker, Carl. The Declaration of Independence: A study in the history of political ideas. New York, 1922.
- Beneke, F. E. Grundlinien des naturrechts, der politik und der philosophie. Berlin, 1838.
- Bentham, Jeremy. Principles of morals and legislation. 1780.
- Bergbohm, Karl. Jurisprudenz und rechtsphilosophie, vol. I. Leipzig, 1892.

- Berolzheimer, Fritz. System der rechts- und wirtschaftsphilosophie. 5 vols. München, 1904-07. Vol. II of the work translated by R. S. Jastrow as *The world's legal philosophies*, Modern Legal Philosophy Series, Boston, 1912.
- Beudant, Charles. Le droit individuel et l'état; introduction à l'étude du droit. 2^e éd. Paris, 1891.
- Bierling, Ernst Rudolf. Juristische prinzipienlehre. 5 vols. Leipzig, 1894-1917.
- Binder, Julius. Rechtsbegriff und rechtsidee: bemerkungen zur rechtsphilosophie R. Stammlers. Leipzig, 1915.
- Bitzer, Friedrich. Das system des natürlichen rechts. Stuttgart, 1845.
- Blake, Ralph Mason. "On natural rights," *International Journal of Ethics*, XXVI (October, 1925), 86.
- Boistel, Alphonse. Cours élémentaire de droit naturel ou de philosophie du droit, suivant les principes de Rosmini. Paris, 1870.
- Cours de philosophie du droit professé à la faculté de droit de Paris. 2 vols. Paris, 1899.
- Bonatelli, Francesco. Del diritto naturale fondato sull' etica. 1860.
- Bonnecase, Julien. La notion de droit en France au dix-neuvième siècle. Contribution à l'étude de la philosophie du droit contemporain. Paris, 1919.
- Bonnin, Charles Jean Baptiste. Traité du droit, contenant les principes du droit naturel et du droit des nations, pour servir d'introduction à l'étude des lois et à la connaissance des traités. Paris, 1808.
- Bonnuci, Alessandro. La derogabilita del diritto naturale nella scolastica. 1906.
- Boucaud, Charles. Qu'est ce que le droit naturel? Paris, 1906.
- L'idée de droit et son évolution historique. Paris, 1906.
- Les droits de l'état et les garanties civiles du droit naturel. 1908.
- Bourgeois, Léon Victor Auguste. Déclaration des droits de l'homme et du citoyen 1789, expliquée et accompagnée de lectures. Paris, 1902.
- Breuer, Isaac. Der rechtsbegriff auf grundlage der Stammlerschen sozialphilosophie. Berlin, 1912.
- Brini, G. Jus naturale. Bologna, 1889.
- Brown, William Laurence. An essay on the natural equality of men; on the rights that result from it and on the duties which it imposes. 2d ed. London, 1794.
- Brugi, B. "Il periodo del diritto naturale in Germania," *Rivista Italiana per le Scienze Giuridiche* (1901), p. 404.
- Brunetti, G. "Il diritto naturale nella legislazione civile," *Rivista del Diritto Commerciale*, XX (1922), nos. 8, 9.
- Brütt, Lorenz. Die kunst der rechtsanwendung. Berlin, 1907.
- Bry, G. "De l'idée d'un droit naturel et de son rôle dans la législation positive," *Bulletin du Comité des Travaux Historiques*, 1901.
- Bryce, James. "The law of nature," in *Studies in History and Jurisprudence*, II (Oxford, 1901), 556.
- Buddens, J. F. Selecta juris naturae et gentium. Halae Saxonum, 1704.
- Burlamaqui, Jean Jacques. Juris naturalis elementa. Geneva, 1754.

- Burlamaqui, Jean Jacques. *Éléments du droit naturel*. Lausanne, 1783.
- *Principes du droit naturel*. Geneva, 1747. *The principles of natural and politic law*. Trans. by Mr. Nugent. London, 1748. 5th ed. 2 vols. Cambridge, Mass., 1807.
- Burle, E. *Essai historique sur le developpement de la notion de droit naturel dans l'antiquité grecque*. Trévoux, 1908.
- Calafat León, Juan. *Las leyes naturales de la vida aplicadas a la constitución política de los estados y a la sociedad de las naciones*. Madrid, 1918.
- Cappellari, Giovanni. *Sulla relazione dell' etica col diritto naturale*. Venezia, 1835.
- Cardozo, Benjamin N. *The nature of the judicial process*. New Haven, 1922.
- *The growth of the law*. New Haven, 1924.
- Carle, G. *La filosofia del diritto nello stato moderno*. Torino, 1903.
- Carlyle, A. J. and R. W. *A history of mediaeval political theory in the West*. 4 vols. New York, 1903-22.
- Carreras y Arano, J. *Filosofía de la ley según Santo Tomás de Aquino*. Madrid, 1919.
- Cassirer, Erich. *Natur- und völkerrecht im lichte der geschichte und der systematischen philosophie*. Berlin, 1919.
- Cathrein, Viktor. *Recht, naturrecht und positives recht. Eine kritische untersuchung der grundbegriffe der rechtsordnung*. 2te aufl. Freiburg im Breisgau, 1909.
- "Naturrechtliche strömungen in der rechtsphilosophie der gegenwart," *Archiv für Rechts- und Wirtschaftsphilosophie*, XVI (1922-23), 54.
- Caumont, Aldrich Isidore Ferdinand. *Étude sur la vie et les travaux de Grotius, ou le droit naturel et le droit international*. Paris, 1862.
- Cauvière, Jules Louis Fortune. *Un nouveau traité de droit naturel*. 1893.
- Charmont, J. *La renaissance du droit naturel*. Montpellier, 1910. Pages 200-216 of this volume translated in *Modern French Legal Philosophy*, Modern Legal Philosophy Series, VII (Boston, 1916), 133-145.
- Chazelle, Rene. *Des garanties données ou à donner au droit naturel de liberté dans la detention préventive*. Thesis. Strasbourg, 1922.
- Clark, Andrew Inglis. "Natural rights," *Annals of American Academy of Political and Social Science*, XVI (1900), 212-226.
- Clay, J. *Schets eener kritische geschiedenis van het begrip natuurwet in de nieuwere wijsbegeerte met eene inleiding omtrent dat begrip bij voor-christelyke denkers*. Leiden, 1915.
- Cohen, M. R. *Jus naturale redivivum*. Reprinted from *Philosophical Review*, XXV (1916), 761.
- Cordovani, M. "Il diritto naturale nella moderna cultura italiana," *Rivista Internazionale di Filosofia del Diritto*, IV (April-June, 1924), 101.
- *Elementa juris naturalis internationalis*. Aretii, 1924.
- Corwin, Edward S. "The 'higher law' background of American constitutional law," *Harvard Law Review*, XLII (December, 1928, and January, 1929), 149, 365.
- Cosentini, E. *La nuova concezione del diritto naturale*. Napoli, 1905.

- Cosentini, E. *Filosofia del diritto*. Torino, 1914. Especially chap. 11 and bibliography, pp. 218-224.
- Cotelle, Louis Barnabe. *Abrégé du cours élémentaire du droit de la nature et des gens par demandes et par réponses*. Paris, 1820.
- Courcelle, Seneuil J. G. "La doctrine du droit naturel," *Le Journal des Economistes* (1891), p. 7.
- Cranenburgh, Leonardus Petrus Alphonsus Maria Van. *Naturrecht en positief recht*. Dissertation, Amsterdam, 1902.
- Cromaziano, Agatopiste. *Della istoria critica del moderne diritto di natura e di genti*. Discorsi raccolti dalla restaurazione di ogni filosofia. Perugia, 1789.
- Cruet, Jean. *Étude juridique de l'arbitraire gouvernemental et administratif*. Paris, 1906.
- Cumberland, Richard. *De legibus naturae*. London, 1672.
- Dahn, Felix. *Die vernunft im recht*. Grundlagen der rechtsphilosophie. Berlin, 1879.
- Darjes, Joachim Georg. *Institutiones jurisprudentiae universalis in quibus omnia juris naturae socialis et gentium capita in usum auditorii sui methodo scientifica explanantur*. 3a ed. Jenae, 1748.
- *Observationes juris naturalis, socialis ad ordinem systematis sui selectae*. 2 vols. Jenae, 1753.
- Daunou, Pierre Claude François. *Essai sur les garanties individuelles*. 1818.
- De Glinka. *Esquisse d'une théorie de droit naturel*. Paris, 1836.
- Demogue, René. *Les notions fondamentales de droit privé*. Paris, 1911.
- Deslandres, M. "Étude sur le fondement de la loi," *Revue du Droit Public*, XXVIII (1908), 5.
- Deville, Abbé. *Le droit canon et le droit naturel; études critiques*. Lyon, 1880.
- Diels, Hermann. "Ein antikes system des naturrechtes," *Internationale Monatschrift für Wissenschaft, Kunst und Technik*, XI (1916), 82.
- Donati, D. *Il problema delle lacune dell' ordinamento gauridico*. Milano, 1910.
- Dorlencourt, L. "Le droit naturel," *Revue Pratique de Droit Français*, IX (Paris, 1860).
- Doumergue, Émile. "Les origines historiques de la déclaration des droits de l'homme et du citoyen," *Revue du Droit Public*, XXI (1904), 673.
- Dresch, L. von. *Naturrecht*. Tübingen, 1822.
- Dreske, O. *Zwingli und das naturrecht*. Halle, 1911.
- Droste-Hülshoff, Clemens August von. *Lehrbuch des naturrechtes oder der chtsphilosophie*. 2te aufl. Bonn, 1823.
- Dubois, Auguste. *L'évolution de la notion de droit naturel antérieurement aux physiocrates*. Paris, 1908.
- Dugast, L. *Les lois sociales devant le droit naturel*. Paris, 1899.
- Duguit, Léon. *Le droit social, le droit individuel et la transformation de l'état; conférences faites à l'école des hautes études sociales*. 2^e éd. Paris, 1911.

- Duguit, Léon. L'état, le droit objectif et la loi positive. 2 vols. Paris, 1901.
 ———. Traité de droit constitutionnel. 2^e éd. 5 vols. Paris, 1921-26.
- Dyroff, Adolf. "Naturrecht und psychologie," *Archiv für Rechtswissenschaft*, XV, 309.
- Eckstein, W. Das antike naturrecht in sozialphilosophischer beleuchtung. Wien, Leipzig, 1926. Bibliography, pp. 119-135.
- Egger, F. Das natürliche öffentliche recht nach den lehrsätzen des freiherrn C. A. von Martini vom staatsrechte, mit beständiger rücksicht auf das natürliche privatrecht (von) Franz Edlen von Zeiller und auf das positive europäische völkerrecht. Wien, Triest, 1809-10.
- Eggers, Christian Ulrich Detlev. Institutiones iuris civitatis publici et gentium universalis. Hafniae, 1796.
- Ehrlich, E. Freie rechtsfindung und freie rechtswissenschaft. Leipzig, 1903.
- Eulenberg, Franz. "Naturgesetze und soziale gesetze; logische unter-suchungen," *Archiv für Sozialwissenschaft und Sozialpolitik*, XXXI, 711; XXXII, 689, 780 (Tübingen, 1910-11).
- Faguet, Émile. Le libéralisme. Paris, 1903.
- Felice, Fortuné Barthélemy de. Leçons de droit de la nature et des gens. 4 vols. Yverdon, 1769.
- Fernández Concha, R. Filosofía del derecho o derecho natural dispuesto para servir de introducción a las ciencias legales. 2a ed. 2 vols. Barcelona, 1887-88.
- Ferrer Neto Paiva, Vicente. Elementos de direito natural, ou de philosophia de direito. 2a ed. Coimbra, 1850.
- Feuerbach, P. J. Kritik des natürlichen rechts als propädeutik zu einer wissenschaft der natürlichen rechte. Altona, 1796.
- Fichte, Johann Gottlieb. Grundlage des naturrechts, nach prinzipien der wissenschaftslehre. Jena und Leipzig, 1796-97. Trans. by A. E. Kroeger as The science of rights, Philadelphia, 1869.
- Filomusi-Guelfi, Francesco. Del concetto del diritto naturale e del diritto positive nella storia della filosofia de diritto. Napoli, 1874.
- Finnettus, J. F. De principiis juris naturae et gentium adversus Hobbesium, Pufendorfium, Thomasium, Wolfium et alios. 2a ed. 2 vols. Venetiis, 1777.
- Fischer, Fr. Ueber den gegenwärtigen stand des naturrechts, nebst winken zu seiner weiterbildung. Basel, 1837.
- Fleischer, J. L. Institutiones juris naturae et gentium, in quibus regulae justae, decori atque honesti potissimum secundum principia Thomasiae distincte explanantur et applicantur. 2a ed. Halae, Magdeb., 1730.
- Fortescue, Sir John. De natura legis naturae.
- Foster, C. J. Natural law: A lecture introductory to the course of Jurisprudence in University College, London. London, 1851.
- Fouillée, Alfred. L'idée moderne du droit. Paris, 1878. 7^e éd. Paris, 1913.
- Frank, Reinhard. Naturrecht, geschichtliches recht und soziales recht. Leipzig, 1891.

- Friters, Alfred. *Revolutionsgewalt und notstandsrecht. Rechtsstaatliches und naturrechtliches.* Berlin, 1919.
- Fritot, Albert. *Cours de droit naturel, public, politique et constitutionnel.* 4 vols. Paris, 1827.
- Fuchs, Ernst. *Recht und wahrheit in unserer heutigen justiz.* Berlin, 1908.
- Geny, François. *Science et technique en droit privé positif.* 4 vols. Paris, 1914-24.
- Gerard de Rayneval, Joseph Mathias. *Institutions du droit de la nature et des gens.* 2^e éd. Paris, 1803.
- Gerigh, Hubert. *Der irrthum beim ehevertrage nach dem naturrecht.* Breslau, 1913.
- Gierke, Otto Von. *Johannes Althusius und die entwicklung der naturrechtlichen staats-theorien; zugleich ein beitrage zur geschichte der rechtssystematik.* 3te aufl. Breslau, 1913.
- *Naturrecht und deutsches recht.* Frankfurt, 1883.
- *Political theories of the Middle Ages.* Trans. by F. W. Maitland. Cambridge, 1922.
- Giese, Friedrich. *Die grundrechte.* Tübingen, 1905.
- Giner, F. *Estudios jurídicos y políticos.* Madrid, 1875.
- Giner, F., und Caldron, A. *Zur vorschule des rechts: Kurzgefasste grundsätze des naturrechts in vorlesungen, frei übersetzt von Karl Röder, herausgegeben von Paul Hohlfeld und Aug. Wünsche.* Leipzig, 1907.
- Grabmann, Martin. "Das naturrecht der scholastik von Gratian bis Thomas von Aquin," *Archiv für Rechts- und Wirtschaftsphilosophie*, XVI (1922-23), 12-53.
- Grondin, Max. *Les doctrines politiques de Locke et l'origine de la déclaration de droits.* Thesis. Bordeaux, 1920.
- Gros, Karl Heinrich Von. *Lehrbuch der philosophischen rechtswissenschaft oder des naturrechts.* 4te aufl. Stuttgart und Tübingen, 1822.
- Grotius, Hugo. *De jure belli ac pacis.* Paris, 1625. Grotius' work appeared in many editions.
- Guelfi, F. Filomusi. *Del concetto del diritto naturale e del diritto positivo nella storia della filosofia del diritto.* 2a ed. Roma, 1909.
- Guillemon, Pierre. *De la rebellion et de la résistance aux actes illegaux.* Thesis. Bordeaux, 1921.
- Gundling, N. H. *Jus naturae ac gentium connexa ratione novaque methodo elaboratum.* Ed. nova. Genevae, 1751.
- Gunnerus, Johann Ernst. *Vollständige erläuterungen und anmerkungen über das natur- und völkerrecht des Herrn Hofrath Darjes.* Frankfurt und Leipzig, 1748.
- Gutberlet, Konstantin. *Ethik und naturrecht.* 1883. 3te aufl. 1901.
- Gysin, Arnold. "Die lehre vom naturrecht bei Leonard Nelson und das naturrecht der aufklärung," *Archiv für Rechts- und Wirtschaftsphilosophie*, XVII (Berlin, 1924).
- Haines, Charles Grove. "The law of nature in state and federal judicial decisions," *Yale Law Journal*, XXV (June, 1916), 617.

- Hägermann, Gustav. Die erklärungen der menschen- und bürgerrechte in den ersten americanischen staatsverfassungen. Berlin, 1910.
- Haghetta, E. Déclaration des droits de l'homme. 1900.
- Haldane, Lord. Higher nationality: a study in law and ethics. American Bar Association Reports, XXXVIII, 1913.
- Haring, Johann Baptist. "Zur neueren naturrechtslehre," *Theolog. Prakt. Quartalschrift*, LXXV (1922), 209, 384.
- Hauriou, M. "Le droit naturel et l'Allemagne," *Le Correspondant* (Sept. 25, 1918), pp. 913-939.
- Haus, J. J. Elementa doctrinae juris philosophicae sive juris naturalis. Gandavi, 1824.
- Haymann, F. Kants kritizismus und die naturrechtlichen strömungen der gegenwart; festrede der zweihundertjähriger wiederkehr des geburts-tages von Immanuel Kant gehalten am 8. marz 1924 in der juris-tischen gesellschaft in Köln. Berlin, 1924.
- "Naturrecht und positives recht," *Zeitschrift für Rechtsphilosophie in Lehre und Praxis*, I (Leipzig, 1914), 233.
- Hegel, Georg Wilhelm Friedrich. Grundlinien der philosophie des rechts oder naturrecht und staatswissenschaft im Grundrisse. Trans. by S. W. Dyde as Hegel's philosophy of right, London, 1896.
- Heineccius, Johann Gottlieb. Elementa juris naturae et gentium, commoda auditoribus methodo adornata. Halae, 1738.
- A methodical system of universal law; or, The laws of nature and nations deduced from certain principles, and applied to proper cases. Trans. by George Turnbull. To which is added, a discourse upon the nature and origin of moral and civil laws. 2 vols. London, 1763.
- Hemming, Nic. de. De lege naturae. Viteb., 1564.
- Hennebicq, L. Philosophie du droit et droit naturel. Bruxelles, 1897.
- Herbart, J. F. Analytische beleuchtung des naturrechts und der moral, zum gebrauch beym vortrage der praktischen philosophie. Göttingen, 1836.
- Hertling, Georg Graf v. Naturrecht und sozialpolitik. 1897.
- Heydenreich, Karl Heinrich. System des naturrechts nach kritischen principien. 2te aufl. 2 vols. Leipzig, 1801.
- Hinrichs, H. F. W. Geschichte des natur- und völkerrechts. Leipzig, 1848-52.
- Hobbes, Thomas. Leviathan. 1651.
- Elements of law, natural and politic. Edited with notes by Ferdinand Rönnes. London, 1889.
- Hocking, William Ernest. Present status of the philosophy of law and of rights. New Haven, 1926.
- Holder. Allgemeine grundsätze des natürlichen staatsrechts. Berne, 1863.
- Hoffbauer, Johann Christoph. Naturrecht aus dem begriffe des rechts entwickelt. Mersburg, 1825.
- Holaind, René Isidore. Natural law and legal practice. New York, 1899.
- Holberg, L. de. Einleitung in des natur- und völkerrechts, aus dem dan-ischen. Hafn., 1748.
- Höpfner, Ludwig Julius Friederich. Naturrecht des einzelnen menschen,

- der gesellschaften und der völker. 6te aufl. Frankfurt und Leipzig, 1792.
- Hübner, Martin. Essai sur l'histoire du droit naturel. 2 vols. London, 1757-58.
- Huebner, Margarete. Untersuchungen über das naturrecht in der altchristlichen literatur, besonders des abendlandes vom ausgange des 2. jahrhunderts bis Augustin. Dissertation, Bonn, 1918.
- Hufeland, Gottlieb. Lehrsätze des naturrechts und der damit verbundenen wissenschaften zur vorlesungen. Jena, 1790. 2te aufl. Frankfurt und Leipzig, 1795.
- Hugo, Georg. Lehrbuch des naturrechts als einer philosophie des positiven rechts, besonders des privatrechts. Berol, 1798.
- Huit, C. La philosophie de la nature chez les anciens. Paris, 1901.
- Hurlbut, Elisha P. Essay on human rights and their political guaranties. New York, 1850.
- Huygens, E. Le droit naturel et les lois. Gand, 1904.
- Ihering, Rudolf von. Der kampf um's recht. 18te aufl. Wien, 1913.
- Der zweck im recht. Leipzig, 1877-83. 2 vols. 4te aufl. Leipzig, 1923. Trans. by Isaac Husik as Law as a means to an end, Modern Legal Philosophy Series, vol. V (Boston, 1913).
- Institutes du droit naturel privé et public et du droit des gens, par M. B. 2^e éd. 2 vols. Paris, 1876.
- Jakob, L. H. Philosophische rechtslehre oder naturrecht. Halle, 1795.
- Jellinek, Georg. The declaration of the rights of man and of citizens: a contribution to modern constitutional history. Trans. by Max Far-
rand, New York, 1901.
- Die erklärung der menschen- und bürgerrechte. Ein beitrag zur modernen verfassungsgeschichte. 3te aufl. München, 1919.
- Das recht des modernen staates. Berlin, 1900.
- Die soziaethische bedeutung von recht, unrecht und strafe. 2te aufl. Berlin, 1908.
- Jessup, Henry Wynans. The bill of rights and its destruction by alleged due process of law. Chicago, 1927.
- Jodl, F. "Ueber das wesen des naturrechts und seine bedeutung in der gegenwart," *Juristische Vierteljahrschrift*, XXV (1893).
- Jouffroy, H. Catéchisme de droit naturel à l'usage des étudiants en droit. Leipzig et Paris, 1841.
- Jouffroy, Theodore S. Cours de droit naturel. 2 vols. Paris, 1834-35. 5^e éd. Paris, 1876.
- Jung, Erich. Das problem des natürlichen rechts. Leipzig, 1912. Bibliog-
raphy, pp. 330-334.
- Kant, Immanuel. Die metaphysik der sitten; metaphysische anfangsgründe der rechtslehre. 2d ed. 1798. Trans. by W. Hastie as The philosophy of law: an exposition of the fundamental principles of jurisprudence as the science of right. Edinburgh, 1887.

- Kantorowicz, Hermann U. Zur lehre vom richtigen recht. Berlin und Leipzig, 1909.
- Katholische rechtsphilosophie: Das naturrecht im geschichte und gegenwart, XVI (1922-23). Articles by various authors.
- Kelsen, Hans. Hauptprobleme der staatsrechtslehre, entwickelt aus der lehre vom rechtssatze. 2te aufl. Tübingen, 1923.
- Der soziologische und der juristische staatsbegriff: kritische untersuchung des verhältnisses von staat und recht. Tübingen, 1922.
- "Naturrecht und positives recht," *Revue Internationale de la Theorie du Droit*, II (1927-1928), 71.
- Klein, E. F. Grundsätze der natürlichen rechtswissenschaft nebst einer geschichte derselben. Halle, 1797.
- Klöverhorn, Fritz. Zur entstehung der erklärang der menschen- und bürgerrechte. Berlin, 1910.
- Koehler, Heinrich. Juris socialis et gentium ad ius naturale revocati specimina VII. Jenae, 1737.
- Juris naturalis, ejusque cumprimis cogentis methodo systematica propositi exercitationes VII. Frankfurt, 1738.
- Kohler, Josef. Lehrbuch der rechtsphilosophie. Berlin und Leipzig, 1909. 2te aufl. Berlin, 1917. Trans. by A. Albrecht as Kohler's philosophy of law, Modern Legal Philosophy Series, Boston, 1914.
- "Das naturrecht in der prozesswissenschaft," *Archiv für Rechts- und Wirtschaftsphilosophie*, I, 503.
- "Fichtes naturrecht," *Archiv für Rechts- und Wirtschaftsphilosophie*, III, 172.
- "Die spanischen naturrechtslehrer des 16 und 17 jahrhunderts," *Archiv für Rechts und Wirtschaftsphilosophie*, X, 235.
- Moderne rechtsprobleme. 2te aufl. Leipzig und Berlin, 1913.
- Das recht. Frankfurt, 1909.
- Recht und persönlichkeit in die kultur der gegenwart. 1914.
- Kohler, W. Geist und freiheit: allgemeine kritik des gesetzesbegriffes in natur- und geistwissenschaft. Tübingen, 1914.
- Korkunov, N. M. Cours de théorie générale du droit. Trad. par Schernoff, Paris, 1903; also trans. by Hastings as General theory of law, Modern Legal Philosophy Series, Boston, 1909.
- Krabbe, H. Die lehre der rechtessouveränität. Gröningen, 1906.
- Die moderne staatsidee. 1919.
- The modern idea of the state. Trans. by G. H. Sabine and W. J. Shepard. New York, 1922.
- Krause, Karl C. F. Grundlage des naturrechts, oder philosophischer grundriss des ideales des rechtes. Leipzig, 1803.
- Abriss des systemes der philosophie des rechtes, oder des naturrechtes. Göttingen, 1828.
- Erklärende bemerkungen und erläuterungen zu J. G. Fichtes grundlage des naturrechts. Aus dem handschriftlichen nachlasse des verfasser herausgegeben von Georg Mollat. Leipzig, 1893.
- Das system der rechtsphilosophie. Herausgegeben von K. D. A. Röder. Leipzig, 1874.

- Krauss. Gedanken über staatsethos und internationalen verkehr. 1925.
- Kuhlenbeck, Ludwig. Natürliche grundlagen des rechts und der politik. Einsenach und Leipzig, 1904.
- Kuhn, Fridolin. Die probleme des naturrechts bei Thomas von Aquin. München, 1909.
- Lama, M. A. de la. Derecho natural: lecciones de filosofía del derecho y de principios de legislación. 2a ed. Lima.
- Lampredi, J. M. Juris publici universalis sive juris naturae et gentium theoremata. Diritto pubblico universale, ossia diritto di natura e delle genti. 3a ed. 3 vols. Florentiae, 1792-93. 4 vols. Pavia, 1818.
- Lascaris, J. B. Juris naturae et gentium principia, et officia ad Christianae doctrinae regulam exacta et explicata. 2 vols. Romae, 1778-79.
- Lasson, A. System der rechtsphilosophie. Berlin und Leipzig, 1882.
- Le Fur, Louis. "Le fondement du droit," *Les Lettres* (November and December, 1925, and January, 1926).
- "Le droit naturel ou objectif s'étend-il aux rapports internationaux?" *Revue de Droit International et de Législation Comparée* (1925), p. 59.
- "Le droit naturel et le droit rationnel ou scientifique, leur rôle dans la formation du droit international," *Revue de Droit International et de Legislation Comparée* (July, August, and September, 1927).
- La théorie du droit naturel depuis le XVIII^e siècle et la doctrine moderne. Paris, 1928.
- Leibnitz, G. G. de. Codex iuris gentium diplomaticus. Guelph, 1747.
- Nova methodus discendae docendaeque iurisprudentiae. Lipsiae, 1748.
- Letourneau, Charles. L'évolution juridique dans les races humaines. Paris, 1891.
- Levi, Alessandro. La société et l'ordre juridique. Paris, 1911.
- Il diritto naturale nelle filosofia di Roberto Ardigo. Padova, 1904.
- Levi, Leone. Law of nature and nations as affected by divine law. London, 1855.
- Levy, E. Introduction au droit naturel. Paris, 1922.
- Levy-Bruhl, L. La morale et la science des moeurs. Paris, 1903.
- Linck, Anton Arnold von. Ueber das naturrecht unserer zeit als grundlage der strafrechtstheorien. München, 1829.
- Lioy, Diodato. Della filosofia del diritto. Napoli, 1875-80. Trans. by W. Hastie as *The philosophy of right, with special reference to the principles and development of law*, London, 1875-80.
- Lorimer, James. The institutes of law. A treatise of the principles of jurisprudence as determined by nature. 2d ed. London and Edinburgh, 1880.
- Luzac, E. Du droit naturel, civil et politique en forme d'entretiens. 2 vols. Amsterdam, 1802.
- Maass, J. G. E. Grundriss des naturrechts. Leipzig, 1808.
- Mackintosh, Sir James. A discourse on the study of the law of nature and nations. London, 1799.
- McMaster, John Bach. The acquisition of political, social and industrial rights of man in America. Cleveland, 1903.

- Madihn, Ludwig Gottfried. Grundsätze des naturrechts. Zum gebrauch seiner vorlesungen. 2 vols. Frankfurt, 1794.
- Maffioli. Éléments du droit naturel. 2 vols. Paris, 1800.
- Malbèrg, Carré de. Contribution à la théorie générale de l'état. 2 vols. Paris, 1920-22.
- Manigk, A. Die idee des naturrechts. Berlin und Leipzig, 1926.
- Wie stehen wir heute zum naturrecht? Berlin und Grunewald, 1926.
- Marcaggi, Vincent. Les origines de la déclaration des droits de l'homme de 1789. 2^e éd. Paris, 1912.
- Marin. Historia del derecho natural y de gentes. 2 vols. Madrid, 1780.
- Mausbach, Josef. Naturrecht und völkerrecht. Freiburg, 1918.
- Meinecke, Friedrich. Die idee der staatsräson in der neuen geschichte. München und Berlin, 1925.
- Meister, C. F. G. Bibliotheca juris naturae et gentium. 3 vols. Göttingen, 1794-1857.
- Melillo. Diritto naturale e di genti. Napoli, 1856.
- Mellin, G. S. A. Grundlegung zur metaphysik der rechte oder der positiven gesetzgebung: ein versuch über die ersten gründe des naturrechts. Zullichan, 1796.
- Mendive, J. Elementos de derecho natural. Valladolid, 1884.
- Mendizábal y Martín, L. Tratado de derecho natural. 2 pts. Madrid, 1920-21.
- Menzel, A. Naturrecht und soziologie. Wien, 1912.
- "Kaiser Joseph II und das naturrecht," *Zeitschrift für Öffentliches Recht*, I, 511.
- Meyer, Georg. Der staat und die erworbenen rechte. Leipzig, 1895.
- Meyer, T. Institutiones iuris naturalis. 2 vols. 1886-1900.
- Micelli, Vincenzo. La norma guiridica. Palermo, 1906.
- Michel, Henry. L'idée de l'état: essai critique sur l'histoire des théories sociales et politiques en France depuis la révolution. 2^e éd. Paris, 1896.
- Michelet, K. L. Naturrecht oder rechtsphilosophie als die praktische philosophie, enthaltend rechts-, sitten-, und gesellschaftslehre. 2 vols. Berlin, 1886.
- Miller, William Galbraith. Lectures on the philosophy of law. Designed mainly as an introduction to the study of international law. London, 1884.
- Law of nature and nations in Scotland. Edinburgh, 1896.
- Miraglia, Luigi. Il concetto storico dei diritti innati. Naples, 1881.
- Filosofia del diritto. 3a ed. Naples, 1903. Trans. by John Lisle as Comparative legal philosophy, applied to legal institutions, Modern Legal Philosophy Series, Vol. III, Boston, 1914.
- Modern French legal philosophy. Extracts from A. Fouillée, J. Charmont, L. Duguit and R. Demogue. Trans. by Mrs. F. W. Scott and J. P. Chamberlain, Modern Legal Philosophy Series, Boston, 1916.
- Möhl, Arnold. Ueber das naturrecht. Mannheim, 1821.
- Moliner, V. "Vico: fragment d'un traité inédit de droit naturel," *Revue de Législation et de Jurisprudence*, VI (Paris, 1837).

- Montemayor, Giulio de. *Storia del diritto naturale*. Milan, Palermo, and Naples, 1911.
- Morel de Vindé, Charles Gilbert Terray. *La déclaration des droits de l'homme et du citoyen, mise à la portée de tout le monde, et comparée avec les vrais principes de toute société*. 2^e éd. Paris, 1790.
- Morelly. *Code de la nature; ou, Le véritable esprit des loix*, 1755; pub. avec notice et table analytique par Edouard Dolléans. Paris, 1910.
- Munguía, Clemente de Jesús. *Del derecho natural en sus principios comunes y en sus diversas ramificaciones, o sea, Curso elemental de derecho natural y de gentes, público, político, constitucional, y principios de legislación*. 4 vols. México, 1849.
- Murena, M. *La giustizia naturale*. Napoli, 1760.
- Muriel, Domingo (Cyriaco Morelli). *Rudimenta juris naturae et gentium*. Venice, 1791.
- *Elementos de derecho natural y de gentes*. Trad. de Luciano Abeille, Buenos Aires, 1911.
- Niemeyer, T. "Jus naturae et gentium. Eine umfrage zum gedächtnis des Hugo Grotius," *Zeitschrift für Internationales Recht*, XXXIV (1925).
- Norcia, F. *Juris naturae et gentium institutiones*. 2 vols. Romae, 1830.
- Oldendorp, I. *Iuris naturalis gentium et civilis*. Antverpiae, 1539.
- Passerin d'Entrèves, A. *Il concetto del diritto naturale cristiano e la sua storia secondo E. Troeltsch; nota presentata dai soci Solari e Jannacccone*. Torino, 1926.
- Pérez Gomar, Gregorio. *Conferencias sobre el derecho natural como introducción al curso de derecho de gentes*. Montevideo, 1864.
- Pestel, Fridericus Guilelmus. *Fundamenta jurisprudentiae naturalis, delineata in usum auditorum*. 2a ed. 2 pts. Lugduni Batavorum, 1774.
- Picard, E. *Essai sur la certitude dans le droit naturel*. Bruxelles, 1864.
- Pilati, C. *Ragionamenti intorno alla legge naturale e civile*. Venezia, 1766.
- Platon, Jean Georges. *Pour le droit naturel, à propos du livre de M. Hau-riou: Les principes du droit public*. Paris, 1911.
- Plucknett, Theodore F. T. "Bonham's case and judicial review," *Harvard Law Review*, XL (November, 1926), 30.
- Politz, K. H. L. *Natur- und völkerrecht*. Leipzig, 1827.
- Pollock, Sir Frederick. "The history of the law of nature," *Journal of the Society of Comparative Legislation*, II (1900), 418-433. Reprinted in *Columbia Law Review*, I (January, 1901), 11, and in *Essays in the Law* (London, 1922).
- Portets, Xavier de. *Cours de droit naturel, de gens et public*. Paris, 1830.
- Posada, A. *Transformación del estado*. Traducción con estudio preliminar sobre la nueva orientación del derecho político. Madrid, 1910.
- Post, A. H. *Das naturgesetz des rechts: einleitung in eine philosophie des rechts auf grundlage der modernen empirischen wissenschaft*. Bremen, 1867.
- Pound, Roscoe. *An introduction to the philosophy of law*. New Haven, 1922.

- Pound, Roscoe. Law and morals. 2d ed. Chapel Hill, 1926.
- "The theory of judicial decision," *Harvard Law Review*, XXXVI (April, May, and June, 1923) 641, 802, 940.
- "Philosophical theory and international law," *Bibliotheca Visseriana*, I, 71.
- "Comparative law in the formation of American law," *Acta Academiae Universalis Jurisprudentiae Comparativa*, I (1928), 183.
- Principes naturels du droit et de la politique (par J. F. Dreux du Radier). 2 vols. Paris, 1765.
- Pufendorf, Samuel. De jure naturae et gentium, libri octo. Amsterdam, 1704. Translated and reprinted in many editions.
- De officio hominis et civis juxta legem naturalem libri duo. London, 1673.
- Les devoirs de l'homme et du citoyen, tels qu'ils lui sont prescrits par la loi naturelle. Traduit du latin de Pufendorf, par J. Barbeyrac, Paris, 1830.
- Quesnay, François. Le droit naturel. Paris, 1765.
- Quesnay, R. F. J. "Il diritto naturale," *Biblioteca dell' Economista*, Ser. 1, vol. I.
- Rachel, Samuel. De jure naturae et gentium dissertationes. Ed. by Ludwig von Bar, Washington, D. C., The Carnegie Institution of Washington, 1916. 2 vols. Reproduction of edition of 1676.
- Radbruch, Gustav. Grundzüge der rechtsphilosophie, 1914.
- "Rechtswissenschaft als rechtsschöpfung, ein beitrag zum juristischen methodenstreit," *Archiv für Sozialwissenschaft und Sozialpolitik*, XXII (1906), 335.
- Raymond, George Lansing. Ethics and natural law. New York and London, 1920.
- Rayneval, J. M. G. de. Instituciones de derecho natural y de gentes. Notas de M. Antonio López. 2 vols. Madrid, 1821.
- Redslob, Robert. Die staatstheorien der französischen nationalversammlung von 1789; ihre grundlagen in der staatslehre der aufklärungszeit und in den englischen und amerikanischen verfassungsgedanken. Leipzig, 1912.
- Rees, Wilhelm. Die erklärung der menschen- und bürgerrechte von 1789; beiträge zu ihrer entstehungsgeschichte. Leipzig, 1912.
- Reeves, Jesse Siddall. "The influence of the law of nature upon international law in the United States," *American Journal of International Law*, III (New York, 1909), 547-561.
- Reinhard, L. Historia jurisprudentiae naturalis. Lipsiae, 1725.
- Renard, G. "Le droit, la justice et la volonté," *Recueil Sirey* (Paris, 1924), pp. 87-123.
- Le droit, la logique et le bon sens. Paris, 1925.
- Le droit, l'ordre et la raison. Paris, 1927.
- Ripert, G. "Droit naturel et positivisme juridique," *Annales de la Faculté de Droit d'Aix* (Marseilles, 1918).

- Ritchie, David George. Natural rights, a criticism of some political and ethical conceptions . . . London and New York, 1895. 2d ed. 1916.
- Rivalta, V. Diritto naturale e positivo. Bologna, 1898.
- Röder, Karl David August. Grundzüge des naturrechts oder der rechtsphilosophie. 2 vols. 2te aufl. Leipzig und Heidelberg, 1860-63.
- Rodríguez, C. Elementos de derecho natural. 5a ed. Valencia, 1908.
- Roguin, Ernest. La règle de droit. Paris, 1889.
- Rosmini, E. Della natura del diritto et della sua relazione col dovere. Naples, 1843.
- Filosofia del diritto. 1841. 2a ed. 1865.
- Rossig, C. G. Die grundsätze des natur- und völkerrechts, des allgemeinen staats- und allgemeinne bürgerlichen rechts. Lipsiae, 1794.
- Rothe, Tancredé. Traité de droit naturel théorique et appliqué. 6 vols. Paris, 1885-1912.
- Rotteck, Karl Wenzeslaus Rodecker von. Lehrbuch des vernunftrechts und der staatswissenschaften. 4 vols. Stuttgart, 1829-35.
- Rousseau, Jean Jacques. Discours sur l'origine et les fondements de l'inégalité parmi les hommes. Ed. by Henri François and René E. G. Vail-
lant, New York and London, 1922.
- Royer-Collard. Discours sur l'étude du droit de la nature et de gens. Paris, 1830.
- Rumpf, M. Gesetz und richter, versuch einer methodik der rechtsanwendung. Berlin, 1906.
- Rutherford, Thomas. Institutes of natural law. 2 vols. Cambridge, 1754-56.
- Salmond, John W. "The law of nature," *Law Quarterly Review*, XI (London, 1895), 121.
- Saïlles, Raymond. "École historique et droit naturel," *Revue Trimestrielle de Droit Civil*, 1902, I, pp. 80-112.
- "Le code civil et la méthode historique," *Livre du Centenaire*, I (1904), 95-129.
- Salvadori, G. Das naturrecht und der entwicklungsgedanke. Leipzig, 1905.
- Salvioli, G. Filosofia del diritto. Introduzione: Il diritto natural. Napoli.
- Santilli, A. La scuola del diritto naturale nella filosofia giuridica contéporanea. Napoli, 1905.
- Santistéban, J. S. Derecho natural o filosofía del derecho. 3a ed. Corbeil.
- Savigny, L. von. "Das naturrechts problem und die methode seiner lösung," *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reiche*, XXX (1901), 407.
- Savigny, F. K. von. Vom beruf unsrer zeit für gesetzgebung und rechtswissenschaft. 1814.
- Schaumann, C. G. Wissenschaftliches. naturrecht. Halle, 1792.
- Scherger, George Lawrence. The evolution of modern liberty. New York, 1904.

- Schilling, Friedrich Adolph. Lehrbuch des naturrechts oder der philosophischen rechtswissenschaft mit vergleichender berücksichtigung positiver rechtsbestimmungen. 2 pts. Leipzig, 1859-62.
- Schilling, Otto. Naturrecht und staat nach der lehre der alten kirche. Paderborn, 1914.
- Schlegel, J. F. W. Naturrettens eller den almindelige retslaeres grundsættringe. 2en ud. 2 vols. Köbenhavn, 1805.
- Schmalz, Theodor. Die wissenschaft des natürlichen rechts. Leipzig, 1831.
- Schmidt, Carl. Naturrecht und positives recht. Leipzig, 1873.
- Schoetz, Max. "Natural and inherent rights protected by the Fourteenth and Fifteenth Amendments of the Constitution of the United States," *Marquette Law Review*, VII (1922-23), 154.
- Schroeder, Edward August. Das recht der freiheit: kritisch, systematisch und kodifiziert. Leipzig, 1901.
- Schroeder, L. C. Elementa juris naturalis, socialis et gentium. Groen, 1735.
- Schwarz, Ignaz. Institutiones juris publici universalis, naturae, et gentium, ad normam moralistarum nostri temporis, maxime protestantium, Hugonis Grotii, Puffendorffii, Thomasii, Vitriarii, Heineccii, aliorumque ex recentissimis adornatae, et ad crisin revocatis eorum principiis, primum fusiore, tum succinctiore methodo pro studio academico, praesertim catholico, accomodatae. 2 vols. Venetiis, 1760.
- Schwarz, J. Institutiones juris universalis naturae et gentium. 2 pts. Augustae, 1743.
- Siotto-Pintor, Manfredi. "Diritto naturale, diritto libero e diritto legislativo nel pensiero d'un giurista-filosofo Americano," *Rivista Internazionale di Filosofia del Diritto*, III, 109.
- "La funzione del diritto naturale dottrina del diritto pubblico interno," *Rivista Internazionale di Filosofia del Diritto*, IV, 1.
- Selden, John. De jure naturali et gentium juxta disciplinam ebraeorum, libri septem. Londini, 1640.
- Senn, Felix. De la justice et du droit, explication de la définition traditionnelle de la justice suivie d'une étude sur la distinction du jus naturale et du jus gentium. Paris, 1927.
- Sharp, Granville. Tract on the law of nature and principles of action in man. 2d ed. London, 1809.
- Simon, Ayala J. Concepto del derecho natural. Cómo se vive y se realiza el derecho. San Salvador, 1908.
- Singer, Heinrich. "Das naturrecht im codex canonici," *Archiv für Rechts- und Wirtschaftsphilosophie*, XVI (1922-23), 206-215.
- Smith, Thomas V. Notes on the American doctrine of equality. *International Journal of Ethics*, XXV, 164, 377, and XXXI, 31.
- Smith, George H. Elements of right and of the law. 2d ed. 1887.
- Solari, G. La scuola del diritto naturale nelle dottrine etico-giuridiche de secoli XVII e XVIII. Torino, 1904.
- Spencer, Herbert. Justice: being part IV of the Principles of ethics. New York, 1891.

- Stahl, F. J. Die philosophie des rechts. 1829. 5th ed. 1878.
- Stammeler, Rudolf. Lehrbuch der rechtsphilosophie. Berlin, 1922.
- Die lehre von dem richtigen rechte. Berlin, 1902. Trans. by Isaac Husik as *The theory of justice*, Modern Legal Philosophy Series, vol. VIII. Boston, 1925.
- Rechts- und staats-theorien der neuzeit. Leipzig, 1917.
- Systematische theorie der rechtswissenschaft. Halle, 1911.
- Wirtschaft und recht nach der materialistischen geschichtsauffassung: eine sozialphilosophische untersuchung. 3te aufl. Leipzig, 1896.
- Stephani, H. Grundlinien der rechtswissenschaft oder des sogenannten naturrechts. Erlangen, 1797.
- Suliotis, C. I. Le droit naturel ou philosophie du droit. Paris, 1888.
- Tapparelli d'Azeglio, Luigi. Essai théorique de droit naturel, basé sur les faits. Trad. de l'italien d'après la dernière éd. avec approbation de l'auteur. 4 vols. Paris et Tournai, 1857.
- Saggio teoretico di diritto naturale appoggiato sul fatto. Livorno, 1845.
- Corso elementare di naturale diritto ad uso delle scuole. 2a ed. Napoli, 1850.
- Tarde, Gabriel. "Les transformations du droit," *Étude sociologique*, chap. 6. 8^e éd. Paris, 1922.
- Textor, Johann Wolfgang. Synopsis juris gentium, ed. by Ludwig von Bar. 2 vols. Washington, D. C. 1916.
- Thevenet, Jean. "Un théoricien du droit naturel," *Revue Général du Droit Législation et Jurisprudence* (April and June, 1925).
- Thibaudeau, A. Les lois naturelles et la société des nations. Rennes, 1919.
- Thomasius, C. Fundamenta iuris naturae et gentium. Halle, 1688.
- Institutiones iurisprudentiae divinae. Lipsiae, 1688.
- Grundlehren des natur- und völkerrechts. 1709.
- Tissot, J. Droit naturel. Paris, 1875.
- Tittel, Gottlieb August. Erläuterungen der theoretischen und praktischen philosophie nach Herrn Feders ordnung; natur- und völkerrecht. Frankfurt, 1794.
- Tönnies, Ferdinand. "Hobbes naturrecht," *Archiv für Rechts- und Wirtschaftsphilosophie*, IV, 395; V, 129, 283.
- Tourtoulon, Pierre. Les principes philosophiques de l'histoire du droit. 1919. Trans. by Martha M. Read as *Philosophy in the development of law*, Modern Legal Philosophy Series, Vol. XIII. Boston, 1922.
- Trendelenburg, Friedrich Adolf. Naturrecht auf dem grunde der ethik. Leipzig, 1860. 2te aufl. 1868.
- Troeltsch, Ernst. "Das stoisch-christliche naturrecht und das moderne profane naturrecht," *Historische Zeitschrift*, CVI (München, 1911), 237-267.
- Tucker, Henry St. George. Lectures on natural law. Charlottesville, 1844.
- Tyrell, James. Brief disquisition on the law of nature according to the principles and method laid down in Dr. Cumberland's Latin treatise on that subject, as also his confutations of Mr. Hobbes's principles put into another method. London, 1692.

- De los Ríos Urruti. *La filosofía del derecho en Don Francisco Giner*. 1916.
- Vadillo, Marqués de. *Lecciones de derecho natural*. Madrid, 1898.
- Valensin, A. *Traité de droit naturel*. Vol. I. Paris, 1922.
- Vareilles-Sommières. *Les principes fondamentaux du droit*. Paris, 1889.
- Varvello, F. *Institutiones philosophiae*. Pars III, *Ethica et jus naturae*. 2a ed. 2 vols. Torino, 1923.
- Vattel, Emmerich de. *Le droit des gens, ou, principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains*. 3 vols. Londres, 1758. Translated and reprinted in many editions.
- *Le droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (ed. of 1758). Reproduced in *The classics of international law*, edited by James Brown Scott and published by the Carnegie Institution of Washington (1916), 3 vols.
- Vaunois, Albert. *De la notion du droit naturel chez les Romains. De la propriété artistique en droit français*. Thesis. Univ. of Paris, 1884.
- Vecchio, Giorgio del. *I presupposti filosofici della nozione del diritto*. Bologna, 1905.
- *Il concetto del diritto*. Bologna, 1906. 2a ed. 1912.
- *Il concetto della natura e il principio del diritto*. Torino, 1908. 2a ed. Bologna, 1922. These treatises are translated by J. Lisle in *The formal bases of law*, Comparative Legal Philosophy Series, Boston, 1914.
- "Sui principi generali del diritto," *Archivio Giuridico*, Quarta Serie, vol. I, Fasc. I.
- "Positive right," *Law Magazine and Review*, XXXVIII (May, 1913), 297.
- Verdross, M. *Die einheit des rechtlichen weltbildes auf grundlage der völkerrechtsverfassung*.
- Vico, Giovan Battista. *Dell' unico principio e fine del diritto universale*. Napoli, 1839.
- Vinogradoff, Sir Paul. *Common sense in law*. London, 1914.
- "Legal standards and ideals," *Michigan Law Review*, XXXIII (November, 1924), 1.
- "Reason and conscience in sixteenth century jurisprudence," *Law Quarterly Review*, XXIV (October, 1908), 379.
- Virozsil, A. von. *Jus naturae privatum methodo critica deductum*. 3 vols. Pesthini, 1833.
- Vitriarius, P. R. *Institutiones juris naturae et gentium . . . ad methodum H. Grotii conscriptae; editae denuo et auctae J. J. Vitriario; accedit J. F. Buddei Historia juris naturalis ut et synopsis juris naturalis*. Lugduni et Batavorum, 1704.
- Vittoria, Francisco di. *De juris insulis et de jure belli*, 1696. Trans. by J. P. Bate in *Classics in international law*, Washington.
- Voigt, Moritz. *Die lehre vom jus naturale, aequum et bonum, und jus gentium der Römer*. 4 vols. Leipzig, 1856-76.

- Voltelini, Hans von. "Die naturrechtlichen lehren und die reformen des 18 Jahrhunderts," *Historische Zeitschrift*, CV (München, 1910), 65-104.
- Walter, F. Naturrecht und politik im lichte der gegenwart. 2d ed. Bonn, 1871.
- Warnkönig, L. A. Rechtsphilosophie als naturlehre des rechts. Freiburg, 1839.
- Wilde, Norman. The ethical basis of the state. Princeton, 1924.
- Wolff, Christian. Grundsätze des natur- und völkerrechts, worin alle verbindlichkeiten und alle rechte aus der natur des menschen in einem beständigen zusammenhange hergeleitet werden. Halle im magdeburgischen, 1754.
- Institutiones juris naturae et gentium, in quibus ex ipsa hominis natura continuo nexu omnes obligationes et jura omnia deducuntur. Halae Magdeburgicae, 1754.
- Jus gentium methodo scientifica pertractatum, in quo jus gentium naturale ab eo, quod voluntarii, pactitii et consuetudinarii est, accurate distinguitur. Halae Magdeburgicae, 1749.
- Wright, B. F. "American interpretations of natural law," *American Political Science Review*, XX (August, 1926), 543.
- "Natural law in American political theory," *Southwestern Political and Social Science Quarterly*, IV (December, 1923), 202.
- Zeiller, F. von. Jus naturae privatum. Viennae, 1819.

TABLE OF CASES

- Adair v. United States*, 208 U. S. 161, 144, 163.
Adkins v. Children's Hospital, 261 U. S. 525, 144, 162, 181, 185-189, 203.
Airway Electric Appliance Corporation v. Day, 266 U. S. 71, 232.
Allen v. Jay, 60 Me. 124, 131.
Allgeyer v. Louisiana, 165 U. S. 578, 163, 168.
American Ry. Express Co. v. F. S. Royster Guano Co., 273 U. S. 274, 176.
Ames v. Union Pac. Ry. Co., 64 Fed. 165, 156.
Arndt v. Griggs, 134 U. S. 316, 179.
Atkin v. Kansas, 191 U. S. 207, 179.
- Ballard v. Hunter*, 204 U. S. 241, 175.
Bank of Columbia v. Okley, 4 Wheat. 235, 117, 167.
Bank of State v. Cooper, 2 Yerg. (Tenn.) 599, 85, 112, 113, 167, 174.
Bankhead v. Brown, 25 Ia. 540, 125.
Banton v. Belt Line Ry., 268 U. S. 413, 233.
Barbier v. Connolly, 113 U. S. 27, 148, 161, 168, 169, 178.
Barbour v. Louisville Board of Trade, 82 Ky. 645, 167.
Barclay and Co. v. Edwards, 267 U. S. 442, 233.
Barron v. Baltimore, 7 Pet. 243, 193.
Bartemeyer v. Iowa, 18 Wall. 129, 148, 200, 214.
Bass, Ratcliff and Gretton Ltd. v. State Tax Commission, 266 U. S. 271, 232.
Bayard v. Singleton, 1 Martin 42, 111.
Bedford v. Shilling, 4 Serg. & R. (Pa.) 400, 95.
Beebe v. State, 6 Ind. 501, 101.
Benson v. Mayor, 10 Barb. 223, 174.
Bertholf v. O'Reilly, 74 N. Y. 516, 162, 178.
Block v. Hirsch, 256 U. S. 135, 171.
Bonham's Case, 8 Co. Rep. 107a, 8 Co. 113b and Brownl., 255, 33, 35.
Bosley v. McLaughlin, 236 U. S. 385, 187.
Bowman v. Middleton, 1 Bay (S. Ca.) 252, 111.
Braceville Coal Co. v. People, 147 Ill. 66, 162, 163.
Bradford Corporation v. Ferrand (1902), 2 Ch. 655, 42.
Bradwell v. State, 16 Wall. 130, 148.
Buchanan v. Rucker, 1 Camp. 63, 41.
Budd v. New York, 143 U. S. 517, 155.
Bunting v. Oregon, 243 U. S. 426, 187.
Burns Baking Company v. Bryan, 264 U. S. 504, 190, 191.
Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, 161, 168.
- Calder v. Bull*, 3 Dallas, 386, 86-88, 110, 138, 173.
Carroll v. United States, 267 U. S. 132, 233.

- Chester *v.* Bateson (1920), 1 K. B. 829, 41.
 Chicago, Burlington & Quincy R. R. Co. *v.* McGuire, 219 U. S. 549, 179.
 Chicago, Burlington & Quincy R. R. Co. *v.* Chicago, 166 U. S. 226, 134,
 147, 148, 164, 169.
 Chicago, Milwaukee & St. Paul Railway Co. *v.* Minnesota, 134 U. S. 418,
 155, 168, 204.
 Chicago, Rock Island & Pacific Ry. Co. *v.* Arkansas, 219 U. S. 453, 169.
 City of Bridgeport *v.* Housatonic Railroad Co., 15 Conn. 475, 120.
 City of London *v.* Wood, 12 Modern 669, 34.
 Coates *v.* Mayor of the City of New York, 7 Cow. 585, 131.
 Cochran *v.* Van Surlay, 20 Wend. 364, 130.
 Collier *v.* Frierson, 24 Ala. 100, 337.
 Commissioners of Leavenworth Co. *v.* Miller, 7 Kan. 479, 124.
 Commonwealth *v.* Perry, 155 Mass. 117, 174, 175.
 Concord R. R. *v.* Greely, 17 N. H. 47, 114.
 Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 170.
 Cook *v.* Ottawa Univ., 14 Kan. 418, 128.
 Coppage *v.* Kansas, 236 U. S. 1, 163.
 Corfield *v.* Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3230, 173.
 Couch *v.* Jeffries, 4 Burrows 2460, 89.
 County of San Mateo *v.* Southern Pacific Ry. Co., 13 Fed. 722, 184.
 Crawley *v.* Isaacs, 16 L. T. R. 529, 42.
 Cummings *v.* Missouri, 4 Wall. 277, 164, 174.
 Curtis Admr. *v.* Whipple, 24 Wis. 350, 127.

 Dartmouth College *v.* Woodward, 4 Wheat. 518, 91, 92, 112, 116, 174.
 Dash *v.* Van Kleeck, 7 Johns (N. Y.) 477, 92, 110.
 Davidson *v.* New Orleans, 96 U. S. 97, 147, 153, 164, 168.
 Day *v.* Savadge, Hobart 85, 34.
 Denny *v.* Mattoon, 84 Mass. 361, 99.
 Detroit *v.* Detroit and Howell P. R. Co., 43 Mich. 140, 133.
 Dobbins *v.* Los Angeles, 195 U. S. 223, 179.
 Dominion Hotel *v.* Arizona, 249 U. S. 265, 207.
 Dow *v.* Beidleman, 125 U. S. 680, 155.
 Dred Scott *v.* Sandford, 19 How. 393, 178.
 Dubuque County *v.* Dubuque and Pacific Ry. Co., 4 Greene (Ia.) 1, 124, 125,
 127.
 Dunn *v.* City Council of Charleston, Harper's Law Repts. 189, 132, 167.

 Eakin *v.* Raub, 12 Serg. & R. 330, 81, 126.
 Elliott's Executor *v.* Lyell, 3 Call. 234, 90.
 Embury *v.* Conner, 3 N. Y. 511, 132.
 Erie Railroad Co. *v.* Williams, 233 U. S. 685, 187.
 Erwin's Appeal, 16 Pa. St. 256, 115.
Ex parte Smith, 223 Pac. 971, 188.
Ex parte Wall, 107 U. S. 265, 168, 200.

- Fairmont Creamery Co. *v.* Minnesota, 274 U. S. 1, 193.
 Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 164.
 Fisher *v.* McGirr, 1 Gray (Mass.) 101.
 Fletcher *v.* Peck, 6 Cranch 87, 90.
 Fort Smith Light and Traction Co. *v.* Bourland, 267 U. S. 330, 232.
 Franklin *v.* South Carolina, 218 U. S. 161, 176.
 Freeland *v.* Hastings, 10 Allen (Mass.) 570, 127.
 Freeman *v.* Jeffries, L. R. 4 Ex. 189, 42.
 French *v.* Barber Asphalt Pav. Co., 181 U. S. 324, 153.
 Frisbie *v.* United States, 157 U. S. 160, 162.
- Gardner *v.* Village of Newburgh, 2 Johns Ch. 162, 92, 131.
 Gast Realty Co. *v.* Schneider Granite Co., 240 U. S. 55, 172.
 Gelpcke *v.* City of Dubuque, 1 Wall. 175, 124, 127.
 Gitlow *v.* New York, 268 U. S. 652, 175, 193, 234.
 Godcharles *v.* Wigeman, 113 Pa. St. 431, 162.
 Goddard *v.* Jacksonville, 15 Ill. 589, 101.
 Goddin *v.* Crump, etc., 8 Leigh (Va.) 120, 120.
 Goshen *v.* Stonington, 4 Conn. 209, 87, 94, 110, 120.
 Granger Cases, 94 U. S. 155, 148, 149, 227.
 Guilford *v.* Supervisors, 18 Barb. 615, 130.
 Gulf, Colorado and Santa Fé Railway *v.* Ellis, 165 U. S. 150, 170.
- Ham *v.* McClaws, 1 Bay (S. Ca.) 93, 89.
 Hanson *v.* Vernon, 27 Ia. 28, 125, 126, 130.
 Herlihy *v.* Donohue, 52 Mont. 601, 181.
 Hoke *v.* Henderson, 4 Dev. 1, or 15 N. Ca. 1, 95, 112, 115.
 Holden *v.* Hardy, 169 U. S. 366, 144, 174, 186.
 Holden *v.* James, 11 Mass. 396, 111, 169.
 Holmes *v.* Holmes, 4 Barb. 295, 101.
 Hood *v.* Lynn, 1 Allen (Mass.) 103, 120.
 Hurtado *v.* California, 110 U. S. 516, 144, 148, 168, 175.
- In re* Dorsey, 7 Porter (Ala.) 293, 113.
In re House Bill, 21 Colo. Rep. 27, 162.
In re Jacobs, 98 N. Y. 98, 178.
In re Kemmler, 136 U. S. 436, 170, 194.
In re Leach, 134 Ind. 665, 164.
In re Opinion of Justices, 58 Me. 590, 121, 128, 131.
 Interstate Commerce Comm. *v.* Louisville & Nashville R. R. Co., 227 U. S. 88, 172.
 Ives *v.* South Buffalo Ry. Co., 201 N. Y. 271, 211.
- Jacobsen *v.* Massachusetts, 197 U. S. 11, 179.
 Jeffers *v.* Fair, 33 Ga. 347, 116.
 Johnson *v.* Clark (1908), 1 Ch. 303, 42.

Johnson *v.* County of Stark, 24 Ill. 75, 123.

Jones' Heirs *v.* Perry, 10 Yerg. (Tenn.) 59, 95, 112.

Kansas City Southern Ry. Co., *et al.* *v.* Road Improvement Dist., 266 U. S. 379, 232.

Kentucky Distilleries and Warehouse Co. *v.* Gregory, 253 U. S. 350, 339.

Kirtland *v.* Hotchkiss, 100 U. S. 491, 153.

Lake Shore & Michigan Southern Ry. Co. *v.* Smith, 173 U. S. 684, 179.

Lawson *v.* Milwaukee and Northern Railway Co., 30 Wis. 597, 124, 127.

Lawton *v.* Steele, 152 U. S. 133, 168.

Lebanon School District *v.* Lebanon Female Seminary, 12 Atl. 857, 133.

Leeper *v.* Texas, 139 U. S. 462, 169.

Legal Tender Cases, 12 Wall. 457, 227.

Levy Leasing Co. *v.* Siegel, 258 U. S. 242, 171.

License Tax Cases, 5 Wall. 462, 174.

Lincoln *v.* Smith, 27 Vt. 328, 101.

Linder *v.* United States, 268 U. S. 5, 233.

Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 62, 191.

Loan Association *v.* Topeka, 20 Wall. 655, 130, 153, 174.

Local Government Board *v.* Arlidge (1913), 1 K. B. 463; (1914), 1 K. B. 160; (1915), A. C. 120, 41.

Lochner *v.* New York, 198 U. S. 45, 168, 171, 178, 185, 185, 187, 191, 203.

Lowell *v.* Boston, 111 Mass. 454, 131.

McClure *v.* Owen, 26 Ia. 243, 125.

McCray *v.* United States, 195 U. S. 27, 221.

Madisonville Traction Co. *v.* St. Barnard Mining Co., 196 U. S. 239, 174.

Maple Flooring Manufacturers' Association *v.* United States, 268 U. S. 563, 233.

Marbury *v.* Madison, 1 Cranch 137, 81, 90.

Master *v.* Miller, 4 T. R. 320, 42.

Mather *v.* City of Ottawa, 114, Ill. 659, 131.

Matter of Albany Street, 11 Wend. 149, 132.

Maxwell *v.* Dow, 176 U. S. 581, 175.

Mayo *v.* Wilson, 1 N. H. 53, 106.

Mead *v.* Acton, 139 Mass. 341, 127, 131.

Merrill *v.* Sherburne, 1 N. H. 199, 101.

Michigan Public Utilities Commission *v.* Duke, 266 U. S. 570, 232.

Millett *v.* People, 117 Ill. 294, 162.

Minneapolis St. Louis R. R. Co. *v.* Beckwith, 129 U. S. 26, 157, 183.

Minnesota *v.* Barber, 136 U. S. 313, 179.

Minor *v.* Happersett, 21 Wall. 162, 194.

Mirehouse *v.* Rennell, 1 Cl. & F. 527, 42.

Missouri Pacific Railway Co. *v.* Humes, 115 U. S. 512, 147, 214.

Missouri Pacific Railway Co. *v.* Nebraska, 164 U. S. 403, 133, 147.

Missouri Pacific Railroad Co. *v.* Road Dist., 266 U. S. 187, 232.

- Monongahela Bridge Co. v. United States, 216 U. S. 177, 176, 211.
 Monongahela Navigation Co. v. United States, 148 U. S. 312, 135, 156, 160, 176.
 Moore v. Dempsey, 261 U. S. 86, 218.
 Morford v. Unger, 8 Ia. 82, 125.
 Moses v. Macferlen, 2 Burr. 1005, 42.
 Mugler v. Kansas, 123 U. S. 623, 179, 214.
 Muller v. Oregon, 208 U. S. 412, 187.
 Munn v. Illinois, 94 U. S. 113, 148, 202, 227.
 Murdock v. Memphis, 20 Wall. 590, 146.
 Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 105, 143.

 National Waterworks Co. v. Kansas City, 62 Fed. 853, 156.
 Needler v. Bishop of Winchester, Hob. 220.
 Noble State Bank v. Haskell, 219 U. S. 104, 328.
 Norman v. Heist, 5 W. & S. 171, 167.
 North Laramie Land Co. v. Hoffman, 268 U. S. 276, 233.
 Northern Securities Co. v. United States, 193 U. S. 197, 195.
 Norwood v. Baker, 172 U. S. 269, 153, 201.
 Nunnemacher v. State, 129 Wis. 190, 174, 211.

 Ochsenbein v. Papelier, L. R. 8 Ch. 695, 42.
 Officer v. Young, 5 Yerg. (Tenn.) 320, 112.
 Ogden v. Saunders, 12 Wheat. 213, 90.
 Ohio Utilities Co. v. Public Utilities Commission, 267 U. S. 359, 233.
 Opinion of Justices, 211 Mass. 624, 131.

 Patterson v. Colorado, 205 U. S. 454, 175, 193.
 Patterson v. The Eudora, 190 U. S. 169, 186.
 Pavesich v. Life Ins. Co., 122 Ga. 190, 211.
 Pembina Mining Co. v. Pennsylvania, 125 U. S. 181, 157.
 Pennoyer v. Neff, 95 U. S. 714, 147, 160.
 Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 171.
 People v. Batchellor, 53 N. Y. 128, 128.
 People v. Brooklyn, 4 N. Y. 419, 123.
 People v. Charles Schweinler Press, 214 N. Y. 395, 162.
 People v. Coler, 166 N. Y. 1, 211.
 People v. Gallagher, 3 Gibbs. (Mich.) 244, 101.
 People v. Gillson, 109 N. Y. 389, 178, 203.
 People v. Hurlbut, 24 Mich. 44, 174.
 People v. La Fetra, 230 N. Y. 429, 171.
 People v. Marx, 99 N. Y. 377, 175, 178.
 People v. Max, 70 Colo. 100, 341.
 People v. O'Brien, 111 N. Y. 1, 133.
 People v. Salem, 20 Mich. 452, 126, 128, 130.
 People v. Smith, 21 N. Y. 595, 123.

- People *v.* State Treasurer, 23 Mich. 499, 129.
 People *v.* Western Union Co., 70 Colo. 90, 341.
 People *v.* Williams, 189 N. Y. 131, 162.
 Pierce *v.* Society of the Sisters, 268 U. S. 510, 233.
 Plessy *v.* Ferguson, 163 U. S. 537, 179.
 Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429, 149, 150.
 Powell *v.* Pennsylvania, 127 U. S. 678, 148.
 Prudential Insurance Co. *v.* Cheek, 259 U. S. 530, 193.
 Pumpelly *v.* Green Bay Co., 13 Wall. 166, 85, 134.

 Railroad Co. *v.* County of Otoe, 16 Wall. 667, 124.
 Reagan *v.* Farmers' Loan and Trust Co., 154 U. S. 362, 155, 178.
 Regents of the University of Maryland *v.* Williams, 9 G. & J. 365, 87, 95, 174.
 Rex *v.* Local Government Board (1914), 1 K. B. 160, 41.
 Rhode Island *v.* Palmer, 253 U. S. 350, 339.
 Rice *v.* Parkman, 16 Mass. 326, 95, 99.
 Riley *v.* Massachusetts, 232 U. S. 671, 187.
 Ritchie *v.* People, 155 Ill. 98, 162.
 Ritchie *v.* Wayman, 244 Ill. 509, 162.
 Rogers *v.* Peck, 199 U. S. 425, 175.
 Ruggles *v.* Illinois, 108 U. S. 526, 155.

 St. Louis *v.* The Ferry Co., 11 Wall. 423, 174.
 San Mateo County *v.* Southern Pacific Ry. Co., 13 Fed. 722, 184.
 Santa Clara County *v.* Southern Pacific Railroad Co., 118 U. S. 394, 157.
 Santa Clara Railroad Tax Case, 9 Sawyer, 165, 157.
 Schibsbys *v.* Westenholz, L. R. 6 Q. B. 155, 41.
 Schmitt *v.* F. W. Cook Brewing Co., 187 Ind. 623, 101.
 Scott *v.* McNeal, 154 U. S. 34, 160, 167.
 Scott *v.* Scott (1913), C. 417, 41.
 Sears *v.* Cottrell, 5 Mich. 250, 167.
 Sharpless *v.* Mayor of Philadelphia, 21 Pa. St. 147, 124, 126, 127, 206.
 Shields *v.* Ohio, 95 U. S. 319, 158.
 Silberschein *v.* United States, 266 U. S. 221, 232.
 Sill *v.* Corning, 15 N. Y. 297, 114.
 Simon *v.* Southern Ry. Co., 236 U. S. 115, 172.
 Sinking Fund Cases, 99 U. S. 700, 200.
 Sioux City Bridge *v.* Dakota County, 260 U. S. 441, 172.
 Slaughter-House Cases, 16 Wall. 36, 145, 146, 149, 160, 175, 200, 204, 214.
 Smyth *v.* Ames, 169 U. S. 466, 155, 156.
 Sohler *v.* Massachusetts General Hospital, 3 Cush. 483, 99.
 Southern Railway Co. *v.* Greene, 216 U. S. 400, 157, 170.
 Speer *v.* School Directors, etc. of Blairsville, 50 Pa. St. 150, 127.
 Spring Valley Water Works *v.* Schottler, 110 U. S. 347, 154.
 Standard Oil Co. *v.* United States, 221 U. S. 1, 195.
 State *v.* ———, 1 Hay. (N. Ca.) 28, 106, 167.
 State *v.* Barker, 116 Ia. 96, 174.

- State v. Doherty*, 60 Me. 504, 113.
State v. Evans, 3 Ill. 208, 133.
State v. Goodwill, 33 W. Va. 179, 162.
State v. Keeran, 5 R. I. 497, 101.
State v. Loomis, 115 Mo. 307, 162.
State v. Moores, 55 Neb. 480, 84.
State v. Nemaha County, 7 Kan. 542, 124, 139.
State v. Norton, 5 Ohio N. P. R. 183, 162.
State v. Noyes, 10 Foster (N. H.) 279, 101.
State v. Paul, 5 R. I. 185, 101.
State v. Simons, 2 Spears 761, 114.
State v. Tappan, 29 Wis. 664, 127.
State, etc. v. Wapello Co., 13 Ia. 388, 125.
State ex rel. Halliburton v. Roach, 230 Mo. 408, 338.
Stebbins and Hurley v. Riley, 268 U. S. 137, 233.
Stein v. Mayor, Aldermen, etc. of Mobile, 24 Ala. 591, 124.
Stewart v. Supervisors of Polk Co., 30 Ia. 9, 126, 130.
Stone v. Farmers' Loan and Trust Co., 116 U. S. 307, 154, 178.
Stone v. Wisconsin, 94 U. S. 181, 149.
Stuart v. Palmer, 74 N. Y. 183, 168.
Symsbury Case, Kirby (Conn.) 444, 89.

Talbot v. Dent, 9 B. Mon. (Ky.) 526, 120.
Taylor v. Beckham, 178 U. S. 548, 201.
Taylor v. Porter, 4 Hill 140, 100, 114, 115.
Taylor v. Thompson, 42 Ill. 9, 127.
Terrett v. Taylor, 9 Cranch 43, 94, 173.
Thomas v. City of Port Huron, 27 Mich. 320, 129.
Thomas v. Leland, 24 Wend. 65, 130.
Texas v. White, 7 Wall. 700, 338.
Town of Guilford v. Supervisors of Chenango Co., 13 N. Y. 143, 124.
Township of Pine Grove v. Talcott, 19 Wall. 666, 124, 129.
Tregor's Case, Y. B. Pasch, 8 Edw. Ill.; *Fitzherbert, Annuities* 41, 34.
Truax v. Corrigan, 257 U. S. 312, 170, 176.
Trustees of the University of North Carolina v. Foy, 2 Hay (N. Ca.) 310, 89, 106, 110.
Turpin v. Lemon, 187 U. S. 51, 179.
Turpin v. Lockett, 6 Call. 113, 90.
Twining v. New Jersey, 211 U. S. 78, 170, 176, 194.
Tyson and Bro. United Theatre Ticket Offices v. Banton, 273 U. S. 418, 191, 192.
Tyson v. School Directors of Halifax Township, 51 Pa. St. 9, 127.

United States v. American Tobacco Co., 221 U. S. 106, 195.
United States v. Cohen Grocery Co., 255 U. S. 81, 144.
United States v. Cruikshank, 92 U. S. 542, 146, 148, 175, 194.
United States v. Harris, 106 U. S. 629, 144.

- United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, 195.
 United States *v.* Trenton Potteries Co., 273 U. S. 392, 195.
 Untermeyer *v.* Anderson, 276 U. S. 440, 144.

 Van Horne's Lessee *v.* Dorrance, 2 Dall. 304, 89.
 Van Zandt *v.* Waddell, 2 Yerg. (Tenn.) 260, 112.
 Varick *v.* Smith, 5 Paige 137, 132.

 Wales *v.* Stetson, 2 Mass. 143, 91.
 Walker *v.* Sauvinet, 92 U. S. 90, 149.
 Wally's Heirs *v.* Kennedy, 2 Yerg. (Tenn.) 554, 112.
 Ward *v.* Barnard, 1 Aikens (Vt.) 120, 112.
 Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86, 176.
 Watson *v.* Maryland, 218 U. S. 173, 175.
 Weismer *v.* Village of Douglas, 64 N. Y. 92, 130.
 Welch *v.* Wadsworth, 30 Conn. 149, 87, 120.
 Wells *v.* City of Weston, 22 Mo. 385, 125.
 West *v.* Louisiana, 194 U. S. 258, 176.
 Wheeler's Appeal from Probate, 45 Conn. 306, 87.
 White *v.* White, 5 Barb. 474, 100, 115, 167.
 Whiting *v.* Sheboygan and Fond du Lac Railroad Co., 25 Wis. 167, 126.
 Whitney *v.* California, 274 U. S. 357, 191, 194.
 Wilkinson *v.* Leland, 2 Pet. 627, 94, 173.
 Wisconsin, Minnesota & Pacific R. R. Co. *v.* Jacobsen, 179 U. S. 287, 179.
 Wolff Co. *v.* Industrial Court, 262 U. S. 522, 192.
 Work *v.* Rives, 267 U. S. 175, 232.
 Wynehamer *v.* State of New York, 13 N. Y. 378, 100, 115, 178.

 Yee Hem *v.* United States, 268 U. S. 178, 233.
 Yeiser *v.* Dysart, 267 U. S. 540, 233.
 Yick Wo *v.* Hopkins, 118 U. S. 356, 144, 169, 178.

 Zylstra *v.* Corporation of Charleston, 1 Bay 382, 111.

INDEX

INDEX

- Abbot, E. V., on natural rights, 339-340
- Adams, John, on natural rights, 54
- Adams, Samuel, on natural rights, 54
- ✓ Ahrens, Heinrich, on natural law, 239-240
- Althusius, on distinction between king and tyrant, 16
- Anglo-Americans, legal points of view of, 44-47
- Appendix, on natural law phrases used by Supreme Court, 232-234
- Aquinas, Thomas, on natural law, 13, 14, 278
- Arbitrary acts, held void by courts, 166-172
- Aristotle, on distinction between fundamental and ordinary laws, 6, 7; dualism of, 6, 7, 23
- Austin, John, opposition to natural rights, 71
- ✓ Bacon, Sir Francis, on law of nature, 35
- ✓ Baudry-Lacantinerie, G., on natural law, 320
- Becker, Carl, on anti-natural rights' doctrine, 66
- Bentham, on natural law doctrines, 68
- Beudant, on natural rights, 243
- Bill of rights, in British North America Act, 83
- Bingham, John A., draft of due process of law clause by, 144
- Blackstone, Sir William, on natural law in *Commentaries*, 38, 39, 56, 57
- Blatchford, Justice, on judicial review of rate regulation, 155
- Bodin, Jean, theory of sovereignty of, 20, 21, 60
- ✓ Boistel, on natural law, 242, 243
- Bossuet, advocate of force theory, 61
- Bracton, use of Roman concepts of natural law, 32, 33
- Bradley, Justice, on judicial review of rate regulation, 156, 157, 204
- Brandeis, Justice, on rule of reason, 190, 191; on fundamental rights, 194
- Brewer, Justice, on protection of property rights, 134, 135; on natural justice, 176; conservative doctrines in Supreme Court decisions and, 201, 202; on duty of courts to protect property, 223
- Brown, Justice, on Duguit's theories, 272
- Brown, Ray A., on cases under due process clause, 184, 185
- Butler, Justice, on rule of reason, 190
- Canon law, natural law in, 13 ✓
- Cardozo, Benjamin N., on natural law theories, 70; on use of natural law, 326; on modern law of nature, 329, 330 — ✓
- Carlyle, R. W. and A. J., on concept of *jus naturale*, 11, 13
- Cathrein, Victor, on natural law, 286-288
- Charmont, Joseph, on natural law, 258-260
- Chase, Justice Salmon P., on immutable fundamental rights, 174
- Chase, Justice Samuel, higher law ideas, 86, 87, 110, 138
- Cicero, on law of nature, 9, 10 ✓
- Clifford, Justice, on legislative supremacy, 153, 154
- Coke, Sir Edward, on doctrine of superior principles of right and justice, 33, 56, 57; opinion in *Bonham's Case*, 33-35; on *Magna Carta* as fundamental law, 37, 38; on due process of law, 107
- Cole, Justice, on judicial review, 126
- Collins, Charles W., cases under Fourteenth Amendment, 183
- Comte, Auguste, on natural rights, 69

- Conservatism, in Supreme Court decisions, 137-139
- Constant, Benjamin, on limitations upon sovereignty, 238, 239
- Constitutions, limits on power to amend, 336-342
- Cooley, Thomas M., on meaning of due process of law, 116, 117; on implied limitations on legislatures, 116n, 138; *Constitutional Limitations* cited, 116, 117, 118, 119; *Law of Taxation* cited, 117, 129; on superior law principles, 118, 119; on public purpose as principle in taxation, 127-130; on public purpose as requirement for exercise of eminent domain, 133; on bills of rights, 171; on limits on amending power, 337
- Corwin, Edward S., on judicial review in New York, 205, 206
- Dalloz, summary of natural rights in, 240, 241
- Declaration of Independence, natural rights' doctrine in, 54; Constitution and, 201
- Declaration of the Rights of Man and of the Citizen, 63-65
- Demogue, R., on natural law, 260
- Dewey, John, on immutable rules, 222, 223
- Dicey, A. V., on judicial legislation, 224, 225; on supremacy of law, 226
- Dickinson, Thomas, on recognition of rights by charters, 54, 55
- Digest* and *Institutes*, natural law in, 10, 11
- Dillon, John F., on implied limits on legislatures, 125-127, 138; on necessity of checks upon majority, 151
- Due process of law, different meanings of, 104-107; in English law, 104, 105; in Massachusetts constitution, 105; in Fifth and Fourteenth Amendments, 106; applied by state justices, 108-116; concepts involved in, 113, 114; economic conditions and, 119-122; reactionary tendencies and, 122-139; Fourteenth Amendment and, 143-165; as applied to regulation of public utilities, 154-159; general rule of reason and, 166-195; fundamental rights and, 172-177; police regulations and, 177-182; extension of meaning of, 182, 185
- Duguit, Léon, on theories of natural law, 260-273
- Ehrlich, Eugen, on natural law, 248 ✓
- Eminent domain, public purpose limitation for, 131-134; limitations on exercise of, in foreign countries, 135, 136
- Esmein, M., on natural rights, 335
- Federalists, the, aims of, 96, 97; on limiting legislative activities, 97-99
- Field, Justice, on interpretation of Fourteenth Amendment, 146, 148; on fundamental rights, 160, 161; on inalienable rights, 174; conservative doctrines in Supreme Court decisions and, 199, 200.
- Fourteenth Amendment, due process of law and, 143-165; restricted interpretation of, 145-149; change in interpretation of, due to economic and political pressure, 149-154; summary of decisions under, for 1924, 234
- French parlements, guardians of fundamental laws, 62, 63
- Fundamental law, English doctrines of, 29-39
- Fundamental rights, acts contravening, are void, 172-177
- Gaius, on natural law, 10 ✓
- Gavet, Gaston, on natural rights, 271
- Geny, François, on Stammler's theories, 250; on natural law, 288-293 ✓
- Gibson, Justice, on reasoning of Marshall, 81, 82
- Gierke, Otto, on higher law theories, 244-246
- Gray, Justice, on judicial review of rate regulation, 155

- Grotius, Hugo, doctrines of natural law of, 18, 19; on state of nature, 51, 52; doctrines of, cited, 92
- Guillemon, Pierre, on higher laws, 270-271
- Guizot, F. P., on higher law, 59
- Haldane, Lord, on relation of moral ideas to law, 313, 314
- Harlan, Justice, on requirement for compensation in eminent domain proceedings, 133, 134; conservative doctrines in Supreme Court decisions and, 200, 201
- Hauriou, M., on superior law doctrines, 273, 274
- Hegel, G. W. F., on natural rights, 69; theories of law of, 237, 238
- Henry, Patrick, on natural rights, 54
- Higher law theories, in mediaeval thought, 14, 15; in England, 29-48; as basis for review of legislative acts by courts, 80-85; in recent Supreme Court decisions, 185-193; limits on state sovereignty and, 331-336
- Higher laws, as guide to legislators, 323-331
- Hobbes, Thomas, distinction between *ius naturale* and *lex naturalis*, 21
- Holdsworth, William E., on Magna Carta, 30; on equity and law of reason, 32; on political functions exercised by courts, 33; on Coke's dicta in Bonham's Case, 35; on supremacy of parliament, 35, 37, 38
- Holland, J. G., on supremacy of parliament, 34n, 37, 38
- Holmes, Justice, on conservative attitude of lawyers, 152; on due process of law, 171; dissent in *Minimum Wage Case*, 187; on legislative supremacy, 192
- Hosmer, Chief Justice, on protecting vested rights, 94, 95; on implied limits on legislatures, 110
- Hough, Justice, on litigation under due process of law, 153, 184
- Houques-Fouciade, M., on natural law, 320
- Ihering, Rudolf von, on higher law philosophy, 246, 247
- Inalienable rights, American theories of, 52-56
- International law, natural law theories in, 294-302
- Isadore of Seville, on natural law, 12, 13
- Jefferson, Thomas, use of natural rights' doctrine, 54, 57; natural rights' theories of, discredited, 65
- Jenks, Edward, on Magna Carta, 30
- John of Salisbury, on distinction between king and tyrant, 16
- Johnson, Justice, on higher law, 90, 91; on due process of law, 116, 117
- Judicial review of legislation, rate regulation and, 154-160; conservative doctrines and, 198-210; in New York, 205, 206; in Massachusetts, 205, 206
- Kant, Immanuel, theories of law of, 237, 238
- Kent, Chancellor, on implied limitations on legislatures, 92-94; on public purpose requirement for eminent domain, 131
- Kohler, Joseph, on natural law, 247
- Krabbe, H., higher law doctrines of, 274-277
- Krause, F., on natural law, 239
- Laissez faire* theories, checks on governmental powers and, 118; individualism and, 121, 122; liberty of contract and, 162; arbitrary wage payment interfered with economic, 186; doctrine of liberty of contract and, 189; Justice Peckham's defense of, 203
- Lambert, Edouard, on judicial review in United States, 207, 208
- Laski, Harold J., on natural rights, 334, 335
- Laurent, on law of nature, 240, 241
- Le Fur, Louis, on natural law, 297-300
- Legislative supremacy, in state governments, 108, 109

- Legislatures, purpose of implied limits on, 95-97
- Liberty of contract, as phase of due process of law, 160-164
- Lincoln, Abraham, on natural rights, 102
- Locke, John, on law of nature, 22, 23; on arbitrary acts of government, 166
- McIlwain, C. H., on fundamental laws in England, 29, 31
- McKechnie, William S., on Magna Carta, 30, 37
- Magna Carta, referred to as fundamental and immutable, 29, 30; law interpreted according to maxims of, 85; "law of land" phrase in, 104, 105; Fourteenth Amendment called American, 143
- Maitland, F. W., on law of nature in development of equity, 32n
- Marshall, John, on judicial review, 81, 82; conservative legal theories of, 196, 197
- Mason, Justice, on natural rights, 114, 115
- Michel, Henri, on natural rights, 243
- Middle Ages, natural law in, 12-17
- Miller, Justice, on implied limitations on legislatures, 130, 138, 153; on interpretation of Fourteenth Amendment, 147; on immutable fundamental rights, 174
- Moody, Justice, on inalienable rights, 176
- Mott, Rodney L., on due process of law, 107n, 108n
- Natural law, Graeco-Roman concepts of, 4-12, 24-27; German current views on, 246-251; metaphysical and theological types of, 278-293; ethical concepts and, 310-316; Dean Pound on types of, 311, 315; philosophical standards and, 316-323
- Natural law concepts, denial of the application of, 75-77
- Natural law ideas, types of, in ancient and mediaeval times, 24-27; in English law, 43, 44; American, 57-59, 216-219
- Natural law theories, ancient and mediaeval, 3-27; in English judicial decisions, 39-43; in relation to natural rights, 49-52; American, 52-59; French, 59-65; in American law, 77-80; return to, 99-103; due process of law and, 104-139; economic and legal bases for, 117-122; judicial review of legislative acts and, 196-234; purpose of, in American constitutional law, 210-216; American political and legal conservatism and, 219-232; continuance of, in Europe, 237-244; German doctrine of a *Rechtsstaat* and, 244-251, European, 302-306; objectives in, 309-336; main types of, 345-349
- Natural rights, decline of theories of, 65-72; ideas on, in colonial times, 78-80
- Nesbitt, James L., on due process of law, 180-181
- Otis, James, on natural rights, 54
- Paine, Thomas, on natural rights, 54, 57
- Paterson, Justice, on natural rights, 89
- Peckham, Justice, on rule of reason, 178; conservative doctrines of, in Supreme Court decisions, 202, 203
- Permanent Court of International Justice, general principles of law and, 324, 325
- Physiocrats, theories of natural rights of, 60, 61
- Pike, L. O., on Magna Carta, 30
- Plucknett, Theodore, F. T., on English fundamental ideas, 31
- Police regulations, reasonableness of, 177-182
- Pollock, Sir Frederick, on supremacy of parliament, 34n, 37, 38; on natural law doctrines in English law, 39-41; on law of nature, 301, 330
- Pound, Roscoe, on metaphysical jurists, 279; on types of natural law, 311, 315

- Powell, Thomas Reed, on interpretation of due process of law, 215, 216
- Pufendorf, Samuel, on law of nature, 22; on state of nature, 51, 52; doctrines of, cited, 92
- Quesnay, on higher law, 60
- Radbruch, Gustav, on natural law, 296
- Ranke, on natural rights, 69
- Reasonableness, standards of, for valid customs, 15; Justice Stone on doctrines of, in Anti-Trust Cases, 194, 195; as standard in judicial review of legislation, 166-195; use of in recent Supreme Court decisions, 232-234
- Rechtsstaat*, German doctrine of, 244-246
- Reformation, theories of natural law and, 17-24
- Renan, on natural rights, 69
- Riddell, Justice, on eminent domain proceedings in Canada, 136
- Roman praetors, ideas of natural justice of, 7, 8
- Roosevelt, Theodore, on judicial law-making, 327
- Root, Elihu, on limitations on amending power, 339
- Rule of reason, due process of law and, 166-195; in recent Supreme Court decisions, 232-234
- Saleilles, Raymond, on natural law, 252-258; on Duguit's theories, 272
- Salmond, John W., on differences between English and Continental points of view, 46, 47; on natural law, 76
- Sanford, Justice, on interpretation of Fourteenth Amendment, 193
- Savigny, on natural rights, 69, 70
- Schiffer, Eugen, on natural law, 296, 297
- Seneca, on doctrine of equality, 19, 55
- Social compact theory, 86, 87
- Social-Utilitarians, repudiation of natural rights' theory by, 68
- Sophists, legal theories of, 5, 6
- Sophocles, idea of higher laws of, 5
- Sovereignty, in Greek thought, 7; higher law theories and limits on, 331-336
- Stammler, Rudolf, on natural law, 248-250
- Stoics, concepts of natural law of, 7-10
- Stone, Justice, on doctrine of reasonableness in Anti-Trust Cases, 194-195
- Story, Justice, on implied limitations on legislatures, 94, 95, 173; conservative legal theories and, 196, 197; on limits on amending power, 337
- Strong, Justice, on interpretation of Fourteenth Amendment, 148
- Super-constitution, created by courts, 227
- Sutherland, Justice, on meaning of due process of law, 185, 186, 192
- Taft, Chief Justice, on meaning of due process of law, 170; dissent in *Minimum Wage Case*, 186
- Thayer, James Bradley, on judicial review, 227-229
- Troeltsch, Ernst, on natural law, 288
- Ulpian, on types of natural law, 10, 11
- Van Buren, Martin, on Federalist policies, 96
- Vattel, on law of nature, 50-52
- Vecchio, Georgio del, on natural law, 279-286
- Vested rights, limits on legislatures to protect, 88-95; Marshall on preserving, 90, 91; Kent on preserving, 92-94; Story on preserving, 94, 95; Hosmer on preserving, 94, 95; New York courts, on preserving, 99-101
- Vinogradoff, Sir Paul, on interpretation of Magna Carta, 30; on modern revival of natural law, 317-319; on natural rights, 335
- Waite, Chief Justice, on judicial review of rate regulation, 155

- | | |
|---|--|
| <p>Washington, Justice, on fundamental rights, 173</p> <p>Webster, Daniel, on due process of law, 112, 116; conservative legal theories and, 196, 197</p> <p>William of Ockham, classification of natural law by, 17 2</p> <p>Wilson, James, on law of nature, 55 A</p> | <p>Wohlgemuth, M., on higher laws, 269, 270</p> <p>Wolff, Frederick von, on natural law, 50; on state of nature, 51, 52</p> <p>Wright, B. F., on American theory of natural rights, 67, 68</p> <p>Zane, John M., on natural law school, 77</p> <p>Zeno, on natural law, 8, 9</p> |
|---|--|





3 8482 00042 1830

Carnegie Mellon Offsite Facility



A029628